Royal Commissio
on Tribunals of Inquiry

DOCUMENTARY EVIDENCE

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MEMORANDA OF EVIDENCE

DOCUMENTARY EVIDENCE

RECEIVED BY THE

ROYAL COMMISSION ON TRIBUNALS OF INQUIRY

MEMBERS

THE RIGHT HONOURABLE LORD JUSTICE SALMON (*Chairman*)

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MR. J. H. HUMPHREYS (*Secretary*)

MR. T. G. MEAD (*Assistant Secretary*)

EXPLANATORY NOTE

The Commission have received as documentary evidence a number of general memoranda, comments by counsel and members of the judiciary upon the memorandum submitted by Mr. John F. Donaldson Q.C., and information on forms of inquiry from sources in Norway, Denmark, Sweden, France, the United States, and the Commonwealth.

This volume contains the documentary evidence received from sources in the United Kingdom with the exception of certain items the publication of which, in the view of the Commission, was not necessary. The Commission decided also not to publish evidence received from abroad.

MEMORANDUM OF EVIDENCE SUBMITTED BY Mr. JOHN F. DONALDSON, Q.C.

1. My experience of Tribunals constituted under the 1921 Act consists of having appeared, as one of the counsel instructed by the Treasury Solicitor, before the Bank Rate Tribunal in 1957 and before the Vassall Tribunal in 1962.

The need for a general power to establish Tribunals of Inquiry

2. There are numerous statutory provisions enabling Ministers to hold inquiries for specific purposes, but I think that there is a real need for a general power. It is almost inevitable that from time to time situations will arise in which sections of the public feel (rather than "know") that something is occurring "which should not be allowed" and the feeling grows that "something should be done about it". This situation can sometimes be dealt with by a criminal investigation. The current disquiet at the Cowley "trials" is being dealt with in this way. In other cases the remedy may lie in the civil courts in the form of a defamation action, although this usually involves substantial delay and merely smothers comment meanwhile. Yet again the solution may lie in a Governmental investigation provided that there is no, or no considerable, party political content in the matters to be investigated. There remains, however, a heterogeneous collection of situations whose common factor is that national or local political reputations are involved. In such cases there is, in essence, a crisis of public confidence and nothing short of a wholly independent and thorough investigation will restore confidence. It is to meet this situation, which may arise either on a national (e.g. Bank Rate) or a local (e.g. Thurso boy) scale that there ought, in my view, to be a general statutory power to establish Tribunals of Inquiry. Whether the same type of Tribunal or the same procedure is appropriate in every case is another matter.

Whether an inquisitorial method is necessary

3. Whilst I prefer the "adversary" method of ascertaining the truth of facts, this is only practicable if it is possible to find adversaries who, between them, are in possession of all relevant evidence and it is further possible to find at least one adversary who is prepared to allege a positive case. In most of the cases in which there is a need for a Tribunal of Inquiry, neither of these conditions will be fulfilled. Accordingly I consider that the adversary method in its pure form is quite impracticable.

4. The truly inquisitorial method is perhaps best exemplified by the Lord Chancellor's investigation which preceded the Bank Rate Tribunal, the uncompleted inquiry by three distinguished civil servants which preceded the Vassall Tribunal, and Lord Denning's inquiry into the Profumo case. In these instances the investigation was, so far as I know, directed by the tribunal.

5. It is, however, possible to have an inquiry which partakes to a greater or lesser extent of both the inquisitorial and the adversary method. An example of this is provided by the Air Accident inquiries. The accidents investigation branch of the Ministry of Civil Aviation investigates all air accidents irrespective of whether or not the Minister orders a public inquiry. The inquiry itself is not held until the departmental investigation is complete. At the inquiry, counsel instructed by the Treasury Solicitor, who may be the Attorney-General, presents the case for the Crown (as opposed to the Government) based upon the evidence produced by the departmental investigation. Interested persons, which may well include Government Departments—e.g. the Ministry of Civil Aviation as operators of airports or traffic controllers—are able to call evidence and the tribunal then reports on the basis of all the evidence. This procedure partakes of much of the adversary method and provision is made for persons to be made parties to the proceedings, in which event they may become liable in costs. I think, although I have not personal experience, that a somewhat similar position obtains in relation to wreck inquiries.

6. The Bank Rate and Vassall Tribunals were more inquisitorial than an air accident inquiry, but they nevertheless adopted the adversary approach to the extent that there was in practice some degree of separation between the task of adjudication, which was solely that of the Tribunal, and the task of investigation which was primarily that of the Attorney-General, the counsel appearing with him, the Treasury Solicitor and his staff. The Tribunal itself was involved in the investigation in the sense that it was informed of the areas of fact which were being investigated, it received copies of all statements of persons who were to be called as witnesses as soon as the statements were available and in advance of their being called, and it was consulted about and approved such action as limiting the inquiries of the Stock Exchange in the case of Bank Rate to transactions of £5,000 nominal and over (see paragraph 8 of the Report) and of dispensing with the oral evidence of certain Japanese Banks (see paragraph 109 of the Report). The Tribunal was not, however, involved in the detail of the investigation to anything approaching the extent to which the Attorney-General and those appearing with him were involved.

7. I should perhaps explain that in the context of these inquiries the Attorney-General fulfilled a dual role. He not only appeared as counsel presenting evidence and making submissions, but he was also, in effect, the Treasury Solicitor's client. In this latter capacity he, or counsel appearing with him, were continuously being informed of the latest pieces of evidence and information and of what amounted to little more than "hunch" and suspicion. Consultations took place daily, and often more frequently, at which the next steps in the investigation were discussed and views were exchanged as to what picture was emerging.

8. If there was not to be considerable delay the investigation had to proceed simultaneously with the hearings before the Tribunal, and discussions such as I have mentioned were an inevitable, and indeed essential, part of the investigation. However, so far as the Vassall Tribunal was concerned, I have no doubt that the total involvement in the investigation which I experienced would have rendered it very difficult for me to have made an objective and dispassionate assessment of the evidence had I been called upon to do so. It is for this reason that I regard the *de facto* separation of function as of the greatest importance.

The constitution of and procedure followed by recent Tribunals

9. This is largely a matter of public record and there is little that I can usefully add. The Commission should, however, know that the proceedings of the Vassall Tribunal which were *in camera* were conducted in exactly the same manner and with the same degree of formality as those which were in public. In particular an opening speech was made by the Attorney-General outlining the order in which evidence would be called and thereafter witnesses were examined, cross-examined and re-examined in the usual way, the Tribunal intervening at the end to put any residual questions to which it wanted answers.

10. In the case of the Vassall Tribunal, the Crown "team" included an additional member of the Bar (Mr. William Stabb) whose primary duty was to safeguard the interests of witnesses who were unrepresented. In the case of such witnesses, he conducted the examination in chief and any re-examination and was generally responsible for ensuring that the witness had every opportunity for doing himself justice. This was, in my view, a useful innovation. By contrast, in the case of the Bank Rate Tribunal, Crown counsel who examined a witness also cross-examined him. In an extreme case, which did not in fact occur, this could result in counsel obtaining a series of affirmative answers to leading questions based on the witness's proof only to follow this up with the cross-examination question "Now all that I have said and with which you have agreed is a tissue of lies, isn't it?"

Alternative forms of inquiry which might have been used to deal with the matters with which recent Tribunals have been concerned

11. The choice of alternative forms of inquiry would depend, in part at least, upon the answers to the following questions:—

(*a*) Are compulsory powers required if the necessary evidence is to be obtained?

(*b*) Are public hearings necessary in order to win public acceptance of the Report or to encourage persons to volunteer evidence?

(*c*) Will witnesses be prepared to give greater assistance if their evidence is (i) given in private and/or (ii) given informally?

(*d*) Can the Tribunal be expected, in the light of the subject-matter, to direct the investigation and at the same time form an objective assessment of the evidence?

The answers to these questions must vary with varying circumstances. In general, if the subject-matter is of considerable political interest and without a security content, I should not expect an inquiry held in private to be acceptable or effective to overcome what I have called a crisis of public confidence. On the other hand, I have no doubt that witnesses will be more forthcoming if they know that their evidence will be taken in private and I think that this would be confirmed by the Treasury Solicitor's staff who were concerned with interviewing potential witnesses for both the Bank Rate and Vassall matters. On the other hand I doubt whether the fact that evidence is to be given formally is an obstacle to obtaining the co-operation of potential witnesses, provided that those who have to take their statements do so with sufficient tact and informality. So far as the Bank Rate and Vassall matters are concerned, I do not think that any other form of inquiry would have been acceptable and indeed another form of inquiry was in each case attempted and proved unacceptable.

Hardship to innocent persons

12. This is a very real problem, although I think that it must be recognised that part of the damage is done, before the Tribunal begins its work, by the very circumstances which give rise to the need for the Tribunal.

13. So far as the Tribunal proceedings themselves are concerned, the damage arises from the fact that an opening speech or evidence called early in the proceedings may reflect adversely upon a person's character or conduct and this may not be rebutted until days or weeks later, by which time Press coverage has been reduced and the adverse imputations have become accepted as fact. The ill effects of this are magnified if a policy is followed of allowing those who may be adversely affected by the Tribunal's findings to give their evidence last. On the other hand any attempt to allow immediate rebuttal will lead to an "accused" person giving evidence more than once or else defending himself before the full case against him has been developed.

14. This risk is minimised if and to the extent that it is possible to carry out the investigation before the Tribunal's proceedings begin, since it is then possible to present a tentative conclusion in an opening statement on behalf of the Crown. On the other hand this may be objectionable as introducing a substantial element of delay and also, perhaps, as having the appearance of Crown counsel seeking to impose their own conclusions on the Tribunal.

15. In the case of the Vassall Tribunal some of these dangers were overcome by the accident that the greater part of the proceedings were held *in camera* and preceded the public hearings. This in its turn created a problem since ways had to be found of ensuring that no one had to answer a case supported by evidence of which he was unaware. This problem was in fact overcome, as is noted in paragraphs 7 and 8 of the Report.

16. The cost of legal representation is clearly a burden which should not fall on the innocent and in the case of the Vassall Tribunal grants were made by the Government to some of those concerned.

Miscellaneous matters

17. The use of the word "urgent" in section 1(1) of the 1921 Act seems misconceived for two reasons. First, all that is required is that the resolution shall describe the matter as urgent and there is no means of challenging whether it is rightly so described. Second, the need for a Tribunal of this type must surely depend solely upon public importance. The Tribunal procedure is not a speedy remedy to be adopted when some other slower remedy is available as an alternative.

18. It is somewhat anomalous that a Tribunal presided over by a Lord of Appeal and including a High Court judge should have to certify the offences specified in section 1(2) to the High Court before any effective steps can be taken to punish for contempt of court. It is perhaps even more anomalous that the High Court should then inquire into the offence, a procedure which could involve the calling of the members of the Tribunal as witnesses and their cross-examination. If there is to be a sanction for defying the Tribunal, as I think that there must be, I suggest that it should be administered by the Tribunal itself if presided over by a person holding high judicial office and that there should be appropriate rights of appeal to the Court of Appeal. In this connection I would draw attention to the position of the Restrictive Trade Practices Court which has this power granted to it by statute subject to certain limitations (Restrictive Trade Practices Act, 1956, Section 2, Schedule paragraph 12).

19. The evidence of a witness may be of importance to the Tribunal, but be of such a nature that the giving of it would expose him to the risk of prosecution for a criminal offence. This is, of course, a good reason for refusing to answer the question. It would be possible to provide that evidence given by a witness before a Tribunal of Inquiry should not be evidence against that witness in any other proceedings, but I am inclined to think that it is better to leave these situations to be dealt with on their merits, either by an undertaking from the Attorney-General that if proceedings are taken he will enter a *nolle prosequi*, or by accepting that the witness need not answer.

20. Section 2(*a*) of the Act restricts the power to exclude the public or a portion of the public to cases in which " it is in the public interest so to do for reasons connected with the subject matter of the inquiry or the nature of the evidence to be given ". There may be cases in which it is not in the public interest that the names of witnesses (e.g. children) should be reported in the Press or on radio or television or that particular parts of the evidence should be so reported (on the analogy of divorce proceedings), but it is nevertheless not in the public interest that any part of the proceedings be *in camera*. It is for consideration whether there should not be power to restrict reporting of names of witnesses or parts of the evidence whilst allowing the public to attend, although I do not suggest it is power which would be used save in very exceptional circumstances.

21. It is not clear to me why the 1921 Act requires a resolution of both Houses of Parliament. If this is intended to prevent the Government of the day from appointing a Tribunal without the concurrence of some members of the Opposition, I doubt whether it is an effective safeguard, at all events when the Government has a majority in the House of Lords. To achieve this purpose the resolution should require support from something more than a simple majority. I should prefer to see the resolution procedure replaced by a power, conferred upon the Lord Chancellor, to establish by statutory instrument a Tribunal of Inquiry under the Act whenever he was of opinion that it was expedient so to do for inquiring into a matter of public importance. The instrument could be made subject to revocation or amendment by Parliament and could specify which of a series of general powers—e.g. those specified in section 1(1) of the 1921 Act, a power of committal for contempt and power to sit in private or restrict the reporting of the proceedings in whole or in part—should be exercisable by the particular Tribunal.

Conclusion

22. I feel strongly that there is a need for a constitutional instrument akin to the 1921 Act, but would like to see a more flexible instrument capable of use not only in relation to major national problems but also in relation to minor local or sectional problems where there is no other statutory power to set up a tribunal of inquiry.

MEMORANDUM OF EVIDENCE SUBMITTED BY THE Hon. Mr. JUSTICE ASHWORTH M.B.E.

1. In my view, it is very desirable that the Tribunal of Inquiry should not be called upon to " descend into the arena ". Its function is to reach a decision upon the evidence placed before it, and while of course its members may ask questions, its role is that of assessing rather than eliciting the evidence.

2. In many, probably in most, cases there will be persons or companies whose conduct is likely to be called in question. Such persons or companies should, if possible, be separately represented and in so far as they give evidence, or evidence is given on their behalf, such evidence should be laid before the Tribunal by their legal representative. Such evidence will be subject to cross-examination but its initial presentation should be done by their own legal representative.

3. In my view, in all inquiries, counsel should be available to assist the Tribunal by cross-examining witnesses who give evidence before it. Such counsel is in no sense counsel for the Tribunal: his function is to test evidence for the assistance of the Tribunal.

4. In many cases there will be formal witnesses whose conduct is not likely to be called in question. They will generally have made statements and if necessary they should be asked to attend, asked to acknowledge their statements and then be open to questioning by persons, or their counsel, affected by the evidence, and by counsel assisting the Tribunal.

5. In some cases there will be another class, namely, persons whose conduct may perhaps be called in question. If they are represented, their evidence should be laid before the Tribunal by their legal representative, and be subject to cross-examination.

If they are not represented, and they have made a statement, the same procedure should be followed as in paragraph 4. If they have not made a statement, they should be open to questioning by all counsel in the form of cross-examination.

6. In my view, counsel assisting the Tribunal should not be regarded as representing any of the witnesses and should have a free hand in cross-examining all.

MEMORANDUM OF EVIDENCE SUBMITTED BY THE GENERAL COUNCIL OF THE BAR

1. The letter of the Secretary to the Royal Commission dated the 7th March, 1966 seeks a general view upon the terms of reference of the Royal Commission together with views on four specific matters. It is convenient to approach the general question by reference to the four specific questions. This memorandum will first deal *seriatim* with the four specific questions, will then deal with the general question, and will conclude with a summary of specific recommendations.

Whether or not an inquisitorial method of inquiry either in private or in public is necessary

2. The inquisitorial method of inquiry is alien to the English concept and system of law and legal procedure, in which the adversary system is highly developed. Special features of the adversary system are that it emphasises the right of the individual to have his case decided in accordance with the law and the evidence and protects him against the power of the executive. Most English lawyers would view with concern any encroachment of the rights of the individual by the executive, and would need to be persuaded first that the remedies afforded by the criminal and civil law were inadequate in particular circumstances, and second that an inquisitorial method of inquiry was necessary.

3. There are already certain circumstances outside the terms of reference of the Royal Commission in which the executive has statutory powers, which extend beyond the normal processes of law, for inquiring into the affairs of private individuals. The most relevant is perhaps the power vested in the Board of Trade by the Companies Act to investigate the affairs of a company. In such investigations the inquisitorial method is always adopted and there are statutory provisions requiring the officers of companies to produce books and documents to the inspector, and to answer questions with the sanction on refusal of proceedings for contempt of court. These investigations are always held in private and the Report is often not published.

4. The circumstances within the purview of the terms of reference of the Royal Commission where powers of investigation have been found to be necessary are where there has been public disquiet concerning matters of high policy and the conduct of Ministers and other persons holding public offices. Before 1921 investigations into such matters were not provided for by any statutory enactment. Such matters were usually referred to either a Royal Commission (e.g. the Royal Commission on the Conduct of the South African War); a Special Commission (e.g. the Parnell Commission of 1888 conducted by three High Court Judges); or a Parliamentary Committee of Inquiry (e.g. the Marconi Inquiry of 1912). It was because of the inadequacies for one reason or another of the first and third types of investigation which had been used formerly that the Tribunals of Inquiry (Evidence) Act was passed in 1921 incorporating similar though narrower provisions to those of the Special Commission Act of 1888 which set up the Parnell Commission. This approach seems to be correct in principle and there can be little doubt that a judicial inquiry is preferable to a Parliamentary Committee into which party affiliations must obviously obtrude, as they did in the Marconi case where the Committee split on party lines and where a majority and a minority report were presented. The central problem is to ensure that the investigation of the facts is full and thorough while at the same time giving reasonable protection to persons who might be adversely affected by the evidence or findings of the tribunal.

5. In order to achieve a full and thorough investigation of the facts it seems inevitable that an inquisitorial method of inquiry should be adopted. It is of interest to note that in both Canada and Australia, where the adversary method is normally followed, there are statutory enactments similar to the English 1921 Act. Under the Canadian Inquiries Act (1952 Revised Statutes Cap. 154) the Governor-General-in-Council (i.e. the executive) may set up an inquiry into "any matter connected with the good government of Canada or the conduct of any part of the business thereof", and the Commissioners have wide inquisitorial powers. Similar powers are vested in Commissioners appointed in Australia by the Governor-General by letters patent under the Royal Commissions Act 1902–1933, although the Commission is normally set up by special statute (e.g. the Royal Commission on Espionage Act 1954 which arose out of the Petrov case) incorporating the principal Act. There is no similar legislation in the United States where such matters are investigated by a Committee of the Senate.

5A. A fundamental distinction between the inquisitorial procedure and the adversary system is that in the former the court has power to call a witness and compel him to answer questions which may tend to establish his guilt in relation to the subject matter of the inquiry. If it is accepted, as the authors of this memorandum accept, that in certain rare cases an inquisitorial procedure is unavoidable, then it is essential to safeguard the interests of the witnesses as far as possible within the framework of this procedure.

6. Hitherto inquiries under the 1921 Act have been held in public as required by Section 2(*a*) thereof except for the hearing of evidence relating to matters affecting national security which, in the Vassall inquiry, was taken *in camera*. The advantages of conducting an investigation in private are clearly set out in paragraph 5 of Lord Denning's Report into the Profumo affair (Cmnd. 2152). The most important in his view is that aspersions cast against others do not achieve the inevitable publicity of a public hearing. This applies particularly to

the investigation of rumours. It is noteworthy that the Australian Royal Commission on Espionage Act 1954 gives the tribunal a complete discretion whether or not to sit *in camera* and provides expressly by Section 16 that the tribunal may sit *in camera* " if the taking of evidence in public would be unfairly prejudicial to a witness ".

7. The 1921 Act empowers Parliament and Parliament alone to establish Tribunals only in relation to matters of urgent public importance. These provisions should be retained intact. The time and expense consumed is enormous. Personal reputations and careers are at stake. Public interest is immense. The normal protection which the rule of law gives to witnesses is to some extent removed. These disadvantages to the citizen are no doubt necessary in a matter of such urgent public importance that both Houses of Parliament have been impelled to pass the necessary resolution, but would not be acceptable in the case of tribunals appointed by any lesser authority, e.g. a Minister, or on lighter grounds.

The constitution of and the procedure followed by recent Tribunals appointed under the 1921 Act

8. In the ensuing examination of some aspects of recent Tribunals, a number of shortcomings are referred to and specific recommendations made. In general, however, many of these shortcomings should be diminished if not eliminated by adoption of the procedure recommended in paragraph 23 *et seq.*

9. Between 1921 and the Lynskey Tribunal in 1948, eleven Tribunals were appointed under the 1921 Act. Of these only one (the Budget Disclosure inquiry in 1936) could be said to have had political implications. Since 1948 there have been four inquiries only one of which (the Waters Tribunal in 1959, and even in that case there had been attacks in Parliament upon the Lord Advocate for not prosecuting the police constables involved) did not have political implications. All the Tribunals since 1921 have been presided over and since 1945 have been entirely composed of either Judges or Queen's Counsel or both. Such persons are accustomed to the investigation of facts by evidence and to the assessment of evidence and it is suggested that there should be a statutory provision in any future Act requiring that the President of the Tribunal should be either a person holding high judicial office or a Queen's Counsel.

10. The 1921 Act contains no procedural provisions and the procedure has been developed by successive Tribunals. Consideration of the matters investigated by the various Tribunals set up since 1921 shows that they fall broadly into two groups:

(*a*) Where a charge has been formulated with sufficient precision to justify immediate investigation into that charge (e.g. the Waters Tribunal where complaints had been made in Parliament about the conduct of police in relation to the case of John Waters) ; and

(*b*) Where there are rumours associated with Press and public comment and consequently a need to investigate the rumours before deciding what if any charge can be formulated and against whom (e.g. the Lynskey, Bank Rate and Vassall Tribunals).

11. The first group presents no real procedural problem. The Waters Tribunal was presided over by a Scottish judge sitting with the Rector of Aberdeen Grammar School and the President of the Scottish Law Society. A Scottish Q.C. (not the Lord Advocate) was appointed to appear on behalf of the Tribunal, and the Chief Constable of Caithness, the two constables principally concerned, and the Waters family were all represented by counsel. The Tribunal kept closely to the Scottish rules of evidence and on several occasions there were successful objections to the admission of evidence.

12. The second group referred to above presents quite a different problem. In such inquiries there is a mass of rumour and Press comment and speculation to be investigated, and the culpability or otherwise of witnesses and other persons who are the subjects of the rumours may only emerge during the course of the

investigation, e.g. Captain Bennett (see paragraph 14 below). Equally rumours may involve aspersions against persons which on investigation are found to be unsupported by any factual basis whatever, e.g. Mr. Galbraith in the Vassall Tribunal. In neither case were any charges formulated. By that time substantial damage may already have been caused to their reputations, and it may be too late to protect them adequately from the consequences. Two examples of the damage which may be done to witnesses when the processes of investigation and assessment of culpability are merged in the course of a single inquiry may be cited.

13. In the Budget Disclosure Tribunal Mr. J. H. Thomas, the then Colonial Secretary, was originally not represented by counsel. No charge was laid against him. By the end of the second day, evidence had been led implicating Mr. Thomas in the disclosure of Budget secrets. On the third day, Mr. Thomas himself gave evidence denying the implication, by which time he was represented by counsel, who had been instructed at short notice. In anticipation of the Report of the Tribunal, Mr. Thomas resigned soon after the inquiry was completed, and in its Report the Tribunal concluded that there had been an unauthorised disclosure by him. Whatever the justice of that conclusion, here was a man whose distinguished career had been brought to an ignominous end without any charge ever having been made against him, without having had any real chance to prepare his defence, and without having had the opportunity during the first two days of cross-examining the witnesses who testified against him.

14. In the Vassall inquiry, Captain Bennett, the Naval Attaché in Moscow for part of the time that Vassall was there, was called as a witness. He had had Vassall under his eye for many months and had noticed nothing unusual about him. No charge was laid against Captain Bennett, but as the investigation proceeded it must have become clear that his whole career was at risk. It was probably unsatisfactory that the only protection that he would have had was from the witnesses' friend, appointed by the Tribunal. In the event he was exonerated by the Tribunal (see Report of the Tribunal appointed to Inquire into the Vassall Case and Related Matters (Cmnd. 2009), paragraphs 118 to 129), but the procedure adopted allowed the future of a senior Naval Officer to be gravely threatened without any real safeguards to protect him.

15. Before either the Bank Rate or the Vassall Tribunal was appointed, some prior investigation had been carried out. In the former case the Lord Chancellor had held a private inquiry, and in the latter a committee of three distinguished civil servants had made some preliminary investigation into Admiralty security. None of these persons had of course any statutory powers; they could not compel the production of documents or the attendance of witnesses; and they could not punish witnesses for refusing to answer questions. In the event none of their reports or findings were relied on by either Tribunal, and indeed the climate of public opinion at the time was such that their findings, even upon a preliminary investigation with a view to formulating charges, would not have been acceptable.

16. The result was that there was no formulation of the issues other than that contained in the warrants appointing the Tribunals. As in the Lynskey Tribunal a team of counsel led by the Attorney-General and instructed by the Treasury Solicitor was appointed to assist the Tribunals in their inquiries. But the ultimate decision as to what documents were relevant and what witnesses were to be called rested with the Tribunals. This involved the closest liaison between the Tribunals and counsel and the Treasury Solicitor, with meetings and consultations before the first sitting of the Tribunal in order to decide how the inquiry should be conducted, and what would be necessary by way of oral and documentary evidence in order to comply with the terms of the warrant.

17. Witnesses were interviewed by the Treasury Solicitor and statements taken from them. Lines of inquiry disclosed by such statements and by documents were then followed up, and in some cases second and even third statements were taken from witnesses as a result of such inquiries. In some cases witnesses were closely cross-examined before the Tribunal upon discrepancies between their original and subsequent statements. This may have been unavoidable, but it is desirable that the Treasury Solicitor should exercise careful discretion in his interviewing of witnesses.

18. In the Vassall inquiry each unrepresented witness was examined by a member of the Attorney-General's team designated as " witnesses' friend ". His function was not particularly to protect the witness but to take him through his statement as a quasi-examination in chief. It was almost impossible as a matter of reality to give the witness advance warning of the criticism that might be made of him and, indeed, since the function of the Attorney-General's team was to probe the evidence, such advance warning might have prejudiced the conduct of the witness and his answers and therefore the Tribunal's search after the truth. Witnesses represented by counsel were examined by their own counsel. All witnesses were then cross-examined by one or other of the Attorney-General's team and, where relevant, by counsel representing other witnesses, and re-examined either by their own counsel or by the " witnesses' friend ". The right of re-examination by the latter was seldom exercised.

19. Unlike his predecessors in the Lynskey and Bank Rate inquiries, the Attorney-General at the Vassall inquiry did not elect to cross-examine his ministerial colleagues. The role of the Attorney-General at inquiries with political implications has been the subject of much published comment (see " The Law Officers of the Crown " by J. le J. Edwards at pp. 295–305). Both Lord Shawcross and Lord Dilhorne have publicly stated that in their view it is an important part of the duties of an Attorney-General to play a leading part in assisting Tribunals appointed under the 1921 Act to investigate the truth of the matters before them. With respect to them, however, it is suggested that the position of an Attorney-General in such circumstances is open to misconstruction in the public mind. The public does not always fully appreciate the distinction between the Attorney-General's position as Chief Law Officer of the Crown, and his position as a member of the Government. Both Lord Shawcross and Lord Dilhorne were the objects of ill-informed criticism for the vigour with which they conducted their examinations. Sir John Hobson was subjected to similar criticism because it was said he did not examine vigorously enough. It is suggested that in cases of inquiries with political implications involving the reputation of ministerial colleagues of the Attorney-General, it would be preferable for the Tribunal to nominate some leading counsel outside the political arena to assist it in its investigations.

20. A further procedural difficulty became evident at all three of the " political " inquiries which have taken place since the last war. The proceedings were very fully reported in the Press and public interest was at its height at the outset. In each case the Attorney-General made an opening statement drawing attention to the existence and nature of the rumours and naming the persons involved. As the inquiries proceeded public interest naturally waned and the evidence and speeches of counsel representing the quasi-accused were less fully reported. Even though a particular person may in the end have been exonerated from all blame the damage may then have been done, and his reputation may have been irreparably harmed.

21. An example of this is the case of Mr. Keswick, whose conduct was the subject of severe strictures by the Attorney-General, both in his opening speech and in examination, before the Bank Rate Tribunal. The strictures in opening were of course made before Mr. Keswick's activities had been investigated. The inquiry lasted from the 2nd to the 20th December, 1957, and nothing was said in Mr. Keswick's defence until the closing stages. The report of the Tribunal exonerating Mr. Keswick was published on the 10th January, 1958. No one can say what impression had been left on Mr. Keswick or in the public mind by the allegations which had been made against him in opening. In the criminal courts in Scotland no opening statement is made by counsel for the prosecution and the evidence is called at the outset. It is suggested that consideration should be given to adopting the Scottish practice for Tribunals set up under the 1921 Act, so that in the initial stages of an investigation no opening statement is made in public until at any rate some charge has been formulated against someone.

Alternative forms of Inquiry

22. In countries which adopt an inquisitorial procedure there is invariably a preliminary investigation of the facts before charges are laid e.g. in France by a *juge d'instruction.* After considerable consideration and discussion among those responsible for this memorandum it is concluded that where the Tribunal is required to investigate rumours some form of separate preliminary investigation is necessary so that a full inquiry into the rumours can be made, while at the same time safeguarding the interests of persons likely to be adversely affected by the evidence. It is not considered that Parliament is a suitable forum for such investigation. Nor is it considered that in the political climate likely to precede the setting up of a Tribunal that an investigation by any individual such as the Lord Chancellor, the Attorney-General, or the Head of the Civil Service is likely to be publicly acceptable, even if such person were given the necessary statutory powers to render the investigation effective. The inescapable conclusion is that the preliminary investigation must be undertaken by the Tribunal itself. This may make the proceedings of the Tribunal more cumbersome and expensive, but this is not an unreasonable price to pay for the considerably increased safeguards which would be available to the quasi-accused. The immediately succeeding paragraphs set out a proposed mode of procedure to achieve this objective.

23. It is suggested that any future statute should divide Tribunals into two types, namely:

(*a*) Tribunals of investigation and trial if necessary ;

(*b*) Tribunals of trial only.

The former class would be appropriate in cases where the initial task of the Tribunal is to investigate rumours, in order to see whether they have any factual foundation (e.g. the Lynskey, Bank Rate, and Vassall Tribunals). In these cases it is not possible at the time when the Tribunal is set up to formulate any specific allegations against anybody, and it is often not even possible to envisage the persons who will as a result of the rumours become the objects of specific allegations. The latter type of Tribunal is appropriate where at the time of the setting up of the Tribunal specific allegations against persons can be formulated (e.g. the Waters Tribunal).

24. The Act should lay down in general terms the procedure for the setting up and conduct of each type of Tribunal, and should contain the following express provisions:—

I. Tribunals of Investigation and Trial if necessary

Establishment

Resolutions of Parliament setting up a Tribunal of this type should prescribe the precise matters which the Tribunal is required to investigate.

Procedure

The Tribunal's procedure should be divided into two completely separate stages:—

A. The investigation stage

(*a*) At this stage it should be the duty of the Tribunal to investigate the matters referred to in the warrant, in order to decide whether there is any factual basis to support any specific allegation against any person.

(*b*) If the Tribunal decide that there is such factual basis, it shall be their duty at the conclusion of the investigation stage to formulate a specific allegation or allegations against named persons.

(*c*) The Tribunal should be empowered with a complete discretion whether to sit in private or in public during all or any part of the investigation stage, but should normally sit in private to hear any evidence likely to be unfairly prejudicial to any persons.

(*d*) There should be no public opening statement by counsel for the Tribunal during the investigation stage.

(*e*) The Rules of Evidence should not apply during the investigation stage.

(*f*) It should be within the complete discretion of the Tribunal whether or not to allow and if necessary recommend to any person legal representation during the investigation stage, subject to one exception, namely that the Tribunal should not formulate any specific charge against any person without first furnishing to him a complete transcript of the evidence of each witness whose testimony is relevant to the proposed allegation, and without first giving him an opportunity to be heard either in person or through a solicitor or counsel.

(*g*) If at the conclusion of the investigation stage the Tribunal concludes that there is no factual basis for any of the rumours it should so report giving its reasons.

B. The trial stage

(*a*) It should be the duty of the Tribunal at this stage to try the specific allegations against persons which it has itself formulated during the investigation stage.

(*b*) The Rules of Evidence should apply strictly to the trial stage.

(*c*) Subject to (*d*) below all facts and documents relied upon in support of any allegation should be proved *de novo* during the trial stage, whether or not the relevant witnesses have given evidence at the investigation stage, unless a person against whom allegations are made consents to the reading of a witness's testimony given at the investigation stage.

(*d*) The Tribunal should have power to call as a witness any person including any person against whom specific allegations are made and witnesses should be liable to be questioned upon any statement made by them to the Treasury Solicitor or any answer given during the investigation stage.

(*e*) During the trial stage any person against whom allegations are made should be entitled to legal representation as of right.

(*f*) The proceedings during the trial stage should be in public, subject only to the power of the Tribunal to sit *in camera* during all or part of the proceedings in the interests of national security.

II. Tribunals of Trial Only

Establishment

The Resolution of Parliament should itself formulate the specific allegations against persons which the Tribunal is set up to try.

Procedure

This should be similar *mutatis mutandis* to the trial stage of a Tribunal of investigation and trial.

The extent to which innocent persons may be caused hardship by being involved in proceedings before Tribunals

25. Examples of the damage which may be caused to the reputations of persons without any or any adequate machinery to safeguard their interests have already been given in paragraphs 13, 14 and 21 of this memorandum. If a "two-tier" Tribunal is adopted as suggested in the preceding section then there will at least be the safeguard that the investigation stage will normally be in private and that no charge will be made against any person without notice, and without the opportunity of legal representation. The question remains however how far statements made by witnesses should be admissible against them in criminal proceedings. No criminal proceedings (apart from proceedings for contempt of court) have yet been taken against any witness who has appeared in a post-war inquiry in respect of matters disclosed by his evidence. But there is no reason why such proceedings should not be taken, and indeed criminal proceedings are often based upon statements made by witnesses in the course of Board of Trade

investigations into Companies. Lord Denning made it clear in his report (paragraph 7) that the evidence given before him should not be used for the purpose of any prosecution or proceeding against anyone. And there is express provision (Section 6 D.D.) in the Australian Royal Commissions Act that statements made by a witness are not admissible in evidence against him in civil or criminal proceedings. It is suggested that a similar provision should be incorporated into any future Act in this country, although this will not of course prevent anyone from seeking evidence *aliunde* and acting upon it.

26. But even if a witness or other person is given notice of any charge to be made against him and the right of legal representation, there still remains the financial cost of defending himself. After the Vassall inquiry the Tribunal certified in certain cases that it was proper that consideration should be given by the Treasury to an *ex gratia* payment from public funds. It is suggested that the Tribunal should have full discretion not only to recommend but to order that the costs of any person who had been legally represented before it should be paid out of public funds. And there would seem to be no reason why the provisions of the Legal Aid and Advice Acts should not be extended to persons legally represented before Tribunals of Inquiry if their means would qualify them in civil proceedings to a grant of legal aid.

Penalties and Immunities

27. In order to avoid the cumbersome procedure of referring cases of contempt of court to the High Court, the Tribunal should at all stages be given the full powers of a High Court judge both in relation to penalties for contempt of court subject to the right of appeal under Section 13 of the Administration of Justices Act 1960, and in relation to the power to summon witnesses to give evidence and produce documents. For the avoidance of doubt there should be express provision granting the Tribunal the immunity of a High Court judge, and a similar immunity to that enjoyed by barristers in the High Court should be granted to advocates appearing before the Tribunal. Witnesses already have such immunity under the 1921 Act.

General

28. It is considered that the inquisitorial method of inquiry into "a definite matter of urgent public importance" on the Resolution of both Houses of Parliament envisaged by the 1921 Act should be retained, subject to drastic alterations of the procedure which has hitherto been followed by Tribunals appointed under the Act. The purpose of the procedural changes recommended is to protect so far as possible the interests of the individual while at the same time ensuring a thorough inquiry.

29. The procedural changes recommended should have statutory force and should be incorporated in any future Act.

Summary of specific recommendations

30. It is suggested that the following recommendations should be incorporated in any future Statute:—

Recommendations	*Paragraph*
(1) Resolution of both Houses of Parliament required appointing Tribunal.	7
(2) President of Tribunal to be a person holding high judicial office or Queen's Counsel.	9
(3) Tribunal to have power to nominate counsel (not the Attorney-General) to be briefed by the Treasury Solicitor and assist in its inquiries including separate counsel as "witnesses' friend" if desirable.	19
(4) Tribunals to be divided into two types:— (*a*) Tribunals of investigation and trial; (*b*) Tribunals of trial only.	23
(5) The warrant appointing a Tribunal of Investigation and Trial to prescribe the precise matters to be investigated.	24

(6) During the investigation stage the Tribunal to have discretion whether to sit in public or private but should normally sit in private to hear any evidence likely to be unfairly prejudicial to any person. ... ... 24 I A

(7) No public opening statement by counsel for the Tribunal during the investigation stage. ... ... 24 I A

(8) During the investigation stage the Tribunal to have discretion whether or not any person shall be legally represented. ... ... 24 I A

(9) During the investigation stage the rules of evidence not to apply. ... 24 I A

(10) At the conclusion of the investigation stage the Tribunal to decide whether any *prima facie* evidence warranting the formulation of a specific allegation against anyone, and if so to formulate such allegation but not before furnishing him with a transcript of the evidence relied on and giving him an opportunity to be heard. ... 24 I A

(11) The allegations to be tried in public unless national security requires any part to be tried *in camera*. ... ... 24 I B

(12) The Rules of Evidence to apply to the trial of the allegations and all the evidence relevant thereto to be called *de novo*. The Tribunal to have power to call all witnesses who have given evidence during the investigation stage including any person against whom specific allegations are made and to examine them upon previous statements. ... ... 24 I B

(13) Any person against whom allegations are made to have the right of legal representation. ... ... 24 I B

(14) If no preliminary investigation necessary, the Warrant appointing the Tribunal to formulate the specific allegations to be tried. 24 II

(15) The Tribunal to try the allegations as in (11) (12) and (13) above. 24 II

(16) Statements made by a witness not admissible against him in civil or criminal proceedings. 25

(17) The Tribunal to have discretion to order the costs of any person legally represented before it to be paid out of public funds. ... 26

(18) The Legal Aid and Advice Acts to apply to persons legally represented before Tribunals. 26

(19) The Tribunal to have the powers and immunity of a High Court judge both in relation to contempt of court and to the powers to summon witnesses and produce documents. 27

(20) Advocates appearing and witnesses giving evidence before the Tribunal to have the immunity of barristers and witnesses in the High Court. 27

MEMORANDUM OF EVIDENCE SUBMITTED BY Mr. JUSTICE BARRY

1. Like Mr. Donaldson, my only experience of these matters consists of being a member of the Vassall Tribunal. A large part of the evidence given before this Tribunal had, of necessity, to be given *in camera*, and this, as the memorandum states, eliminated many of the difficulties referred to in paragraph 13. To be a little more specific, I agree that there are rare occasions when the necessity for a statutory Tribunal does in fact arise, and that a degree of separation between the task of investigation and presentation of the facts and that of adjudication will normally be required. The task of the Attorney-General in such an investigation is undoubtedly a difficult one, but I find it hard to see how this difficulty can be avoided. He is, in a sense, acting as " prosecutor " and at the same time as representative of the public interest, and has to ensure not only that the facts are fully and carefully investigated, but

also that no injustice is done to any individual who is required to appear before the Tribunal. I am satisfied that the inclusion of an additional member of the Bar to safeguard the interests of nonrepresented witnesses, as was done in the Vassall Tribunal, was a valuable innovation.

2. I agree with paragraph 11.

3. As to paragraph 18, I agree that it would be more satisfactory that punishment for contempt should be in the hands of the Tribunal, subject to the right of appeal to the Court of Appeal.

4. In conclusion, I am in general agreement with the memorandum. Although the present procedure is not perfect and contains some elements of danger, I think that these can be, and are, largely obviated by the good sense and fairness of the Tribunal itself and of the Attorney-General. I do not consider that any large-scale amendment of existing legislation is likely to result in any substantial improvement.

MEMORANDUM OF EVIDENCE SUBMITTED BY Mr. PETER BRISTOW, Q.C.

1. I was engaged as junior counsel during both the Bank Rate and Vassall Tribunals on behalf of individuals whose conduct was under investigation. On the basis of that experience I will tender my opinion on the four specific aspects of the problem referred to in the Secretary's letter of 7th March, 1965.

2. Under the 1921 Act, the Tribunal is established for the purpose of inquiring into a definite matter of urgent public importance, and following upon a resolution of Parliament. The only three Tribunals set up since 1945 have all been set up to inquire into such matters after they have been raised in a strictly and hotly political context, and it is difficult to imagine any occasion for setting up such a Tribunal in any other context. In each case the circumstances have been such that it has been obviously and urgently necessary in the public interest that there should be a wholly impartial inquiry into the facts by a non-partisan body. If such an inquiry is to allay the public disquiet which requires it to be made it must, as I think, be a public inquiry. Just as justice must manifestly be seen to be done if respect for the administration of the law is to survive, so I think such an inquiry must manifestly be seen to be thorough and impartial if the object of the exercise is to be achieved. You have only to think of the comparative value for this purpose of the Vassall Tribunal and the recent inquiries by the Trade Unions concerned into the Cowley "Kangaroo Court". For all I know, the conclusions of those inquiries may have been wholly correct; but I have no confidence that they are and indeed I suspect they are not. The cause of my lack of confidence and suspicion is that they were conducted in secret and by persons whom I cannot regard as impartial.

3. A more respectable example of a secret inquiry is Lord Denning's inquiry into the Profumo affair. Here the person making the inquiry was manifestly seen to be impartial and by his whole training well equipped to evaluate the evidence which he was able to discover. But as paragraphs 8 and 9 show, Lord Denning himself was acutely aware not only of the difficulties inherent in operating as a one man band and the fact that they involved the danger of doing injustice but that he would be suspected of "white-washing". Where the matter for inquiry is one of urgent public importance, to ascertain the facts without fear of favour must surely be the first priority, and the one-man-band-private-inquiry approach, however skilfully and scrupulously conducted, is, I suggest, less likely to achieve this and more likely to do injustice to those concerned than a public inquiry. In a public inquiry those concerned know in general terms beforehand what is to be said about them and have the opportunity publicly to defend themselves. You do justice in public so that the public can use its own eyes and see that justice is being done. You should make your inquiry public so that the public can see the evidence for themselves and form their own view of the investigator's report. If all they have is the report, this must open the door to the suspicion that it is white-wash, as Lord Denning clearly recognised in paragraph 9 of his Report.

4. When what you are trying to do is to find out the truth about such subjects as the Bank Rate affair, the Vassall affair, or the Profumo affair, some kind of inquisitorial investigation is essential. Before you get to the stage of putting an accused person in charge of a jury so that his guilt or innocence can be determined according to law, some kind of inquisitorial investigation must have taken place so that it is he, not someone else, who is accused. Inquisition of some sort is necessary to discover the facts which warrant accusation: or the facts which in the case of those whose conduct is involved in a matter of urgent public importance warrants exculpation or censure or even possibly a subsequent criminal charge. To find facts you must ask questions: asking questions, however you do it, is an inquisitorial method of inquiry.

5. In the Bank Rate Tribunal and Vassall Tribunal much of the preliminary work was done by the Treasury Solicitor, and it is difficult to think of anyone who would be more suitable. He has the necessary administrative facilities. It must be easier for him to work with the Departments of State from whom much of the necessary information is likely to be required than it would be for a private solicitor retained *ad hoc* or for someone like the Solicitor to the Metropolitan Police. The problems posed by such an inquiry are, I suppose, a more familiar occupational hazard to him than to those in private practice.

6. In the Bank Rate Tribunal, the Attorney-General conducted both the examination-in-chief and the cross-examination himself, and the change of role occasionally appeared a little startling. In the Vassall Tribunal the examination-in-chief was conducted by junior counsel and the big guns were only unmasked in cross-examination. This was a marked improvement, but there are disadvantages in the participation of the Attorney-General at all. While lawyers appreciate that in all his functions concerned with the administration of justice he acts with complete political impartiality, to most laymen he is first and foremost a party politician and member of the Government. The fact that when he opens the inquiry he always explains that he is functioning in his non-political incarnation demonstrates that there is suspicion to dispel about his role, and I doubt whether any explanation can dispel it. His function before the Tribunal could surely be equally well performed by leading counsel instructed *ad hoc*, with the assistance of the Treasury devil as the key man of the team. In many ways leading counsel instructed *ad hoc* would be in a better position than the Attorney-General in any case, since it may be necessary to cross-examine members of the Government. Had the Profumo affair been investigated by a Tribunal under the 1921 Act, Chapter XII of Lord Denning's Report shows that the Attorney-General would have been a witness, and could not have taken part as counsel in the inquiry.

7. I do not think there is any halfway house between an investigation under the 1921 Act by a Tribunal armed with the whole legal apparatus which has been found necessary to elicit the truth in a court of law, and the wholly informal form of inquiry conducted by Lord Denning in the Profumo affair. Anything in between must inevitably suffer to some degree from the disadvantages of both. The disadvantages of the 1921 Act machinery are set out in Lord Denning's paragraph 5. Whatever form of inquiry is adopted you will always suffer from no prosecution, and no charge. If you use the 1921 Act machinery as it was used in the Vassall Tribunal, you at least know what is said against you, the quasi-charge, and can prepare and make your quasi-defence. The object of the exercise is to find facts. I think that the 1921 Act machinery minimises the danger that you will do injustice on the way. People may get hurt. I think more got hurt in the Bank Rate than in the Vassall Tribunal. But witnesses from time to time get hurt when you are doing justice in a court of law, and in trying not to hurt witnesses you may endanger achieving the object of the exercise.

8. I have heard no criticism and have no criticism to make of the constitution of the Tribunals themselves. The essential is that the members should command public confidence as being wholly impartial and fearless and professionally equipped to get at the truth. I doubt if anyone in the community answers this requirement as well as the judges, and whatever field you pick from obviously

you must pick the first eleven. If, as seems inevitable, the context is political, it must be difficult for any politician to be manifestly seen to be impartial. I see no harm from the public point of view in having a Tribunal composed of a first eleven judge as Chairman with first eleven members from other walks of life as the other members. But nor do I see much advantage ; and it may be difficult in anyone other than a judge to find someone of the obvious political impartiality which you need. My small experience of the production of a report where a lawyer sits with colleagues from other professions is that the drafting burden tends to fall upon the lawyer.

MEMORANDUM OF EVIDENCE SUBMITTED BY Sir ANDREW CLARK M.B.E., M.C., Q.C.

I have read with great interest the memorandum of Mr. Donaldson Q.C. and am substantially in agreement with the views expressed therein subject to the following comments:—

(1) With regard to paragraph 3 of the memorandum, I agree that the "adversary" method of inquiry is by far the most satisfactory whenever the case is such as to permit of its adoption. I do not agree that the "adversary method in its pure form is quite impracticable".

There are of course very many cases in which it would be quite impracticable, but there are also quite an number of cases in which it could be applied with great advantage. Crichel Down was one in which I found it of the greatest assistance.

(2) With regard to paragraph 10, I consider that the procedure adopted by the Bank Rate Tribunal whereby Crown counsel both examined and cross-examined a witness was highly unsatisfactory. Although I did not myself appear before the Tribunal, I advised a number of potential witnesses and I know that this procedure caused very great dissatisfaction. There were to my knowledge at least two attempts to obtain information from witnesses which was not directly relevant to the issue before the Tribunal and which, I regret to say, I could only conclude was desired in order to facilitate an investigation of the tax liabilities of certain persons. This I regard as a very grave matter indeed and one which can only be guarded against by witnesses being represented by totally independent counsel.

(3) In my opinion the answers to the questions posed in paragraph 11 of the memorandum are as follows:—

(*a*) Compulsory powers to obtain evidence are essential.

(*b*) Nothing but a public hearing will ever be acceptable to the public and nothing else will ever satisfactorily clear the reputation of someone who is under suspicion. Over and over again I have heard the comment, even when part of the hearing has been in public, "The usual bucket of whitewash!"

(c) Evidence given in private or informally is always suspect. No doubt you increase the quantity but debase the quality. Evidence given in private runs the grave risk of being grossly unfair to one or more third parties whose names may be involved and who have no means of knowing what allegations may have been made against them.

(*d*) It is extremely difficult, to say the least, for a Tribunal to direct the investigation and at the same time form a judicial assessment of the evidence. The two functions should be separated, though the Tribunal must of course have power at any time to direct further investigation to be carried out.

(4) As to paragraphs 12 and 13 I agree that this is a very serious and difficult problem and I think the only satisfactory protection is for every person whose character or conduct is in any way impugned to be represented

by independent counsel who should have the right to make a short statement on behalf of his client at the close of the opening speech. The cost of such representation should be defrayed by the Government unless all the accusations against the individual concerned are substantiated, but with power for the Tribunal to order that such individual pay his own costs if any serious misdemeanour is proved against him even though other minor allegations may not have been fully substantiated.

(5) As to paragraph 17, I consider that the word "urgent" ought never to have been inserted in Section 1(1) of the 1921 Act. The sole question ought to be whether the matter is of sufficient public importance to justify an inquiry and urgency has nothing to do with it.

(6) As to paragraph 18, I consider it essential that there should be a sanction enforceable by the Tribunal itself for any defiance of the Tribunal. Whenever the Tribunal is presided over by a person holding high judicial office contempt of court seems to be the appropriate sanction. In any other case the procedure laid down by Section 1(2) of the 1921 Act would probably be sufficient. The main objection to this procedure is the inevitable delay.

(7) As to paragraph 20, I am strongly opposed in a matter of public importance to any fetter on the right of the Press to report proceedings which are held in public, and they should only be held *in camera* where the security of the realm so requires. Divorce proceedings are no analogy as they are never of any real public importance. The Press are always ready to co-operate in a request not to publish the names of witnesses if there is a valid reason for not doing so. I consider this is quite sufficient without any compulsory powers.

(8) Lastly, I consider it essential that all evidence should be given on oath in order that a witness may be proceeded against for perjury should he give false evidence. The giving of false evidence before a Tribunal investigating a matter of public importance is a far more serious matter than so doing in a private law-suit, which is undoubtedly serious enough itself and unfortunately far from infrequent.

MEMORANDUM OF EVIDENCE SUBMITTED BY THE NATIONAL COUNCIL FOR CIVIL LIBERTIES

Apart from Mental Health Review Tribunals, the Council is not normally concerned with tribunals of inquiry unless it receives some specific complaint on a matter involving civil liberty which relates to a tribunal.

It did, however, have intensive experience of one particular inquiry conducted by Mr. A. E. James, Q.C. (now Mr. Justice James), in 1964 and usually known as the Challenor Inquiry. This was set up and conducted under the provisions of Section 32 of the Police Act, 1964. The rules as to witnesses and evidence at such an inquiry are those contained in Section 290 of the Local Government Act, 1933, and not those in the Tribunals of Inquiry (Evidence) Act, 1921, but it is thought that some of the criticisms and recommendations which have been put forward by N.C.C.L. as a result of the Challenor Inquiry may be of value to the Commission.

The Council's main concern was that a number of witnesses, who had no desire to give evidence, were called before the inquiry upon summons and then subjected to hostile cross-examination by the counsel whose clients were adversely affected by their evidence. This cross-examination, while in no way improper by the standards of the Old Bailey, was obviously extremely painful to the witnesses, especially to those who had an unhappy record.

It emerges clearly from the prosecution arising out of refusal to give evidence at the Vassall Tribunal that any witness, however reluctant, should be compellable where there is an overriding public interest. But it is a far cry from the

journalists' cases to the sort of treatment, including repeated cross-examination, that certain witnesses had at the Challenor Inquiry. (Details can be obtained and supplied from the daily transcripts if required.)

It should be accepted as part of a man's civil liberty, that he ought not to be compelled to give evidence in the absence of compelling reason and that if he is so compelled he should be given reasonable protection from cross-examination which is relevant as to credit only. The worse his character, the greater his need of such protection. It is particularly unfair, where a man with a record is trying to go straight, that he should be summoned to give evidence and compelled publicly to answer questions about his record.

It is submitted, and this view is shared by many lawyers with experience of inquiries, that we must move away from the conception of a *lis inter partes.* In so far as an inquiry becomes a battle-ground between opposing parties or interests with learned counsel dominating the scene, it ceases to be an inquiry and becomes a trial or an exercise in self-justification. This is encouraged by the present rules of procedure. In the Challenor Inquiry the Chairman appeared at times to play quite a minor role in the proceedings, and it came as a relief when he did put questions directed more to the issues than those put by many of the counsel. It should also be noted that in this inquiry *none* of the complainants would have been legally represented but for the initiative of N.C.C.L. who originally instructed counsel (Mr. Peter Pain and Mr. de Saxe) to represent N.C.C.L. and a number of complainants who had requested N.C.C.L. assistance. Although direct representation to N.C.C.L. was denied, it was generally recognised as the inquiry proceeded that Mr. Pain and Mr. de Saxe, although formally representing only a few complainants, were of considerable general assistance. Nevertheless, this representation was quite outweighed by the battery of Q.C.'s and junior counsel appearing on behalf of the Metropolitan Police and individual police officers, quite apart from Treasury Counsel.

Judged on the basis of the Council's experience of the Challenor Inquiry and such knowledge as it has of the Vassall and other special inquiries, there does seem to be a case for frankly inquisitorial inquiries with the Chairman playing the leading role in procuring evidence and cross-examining witnesses.

The Chairman must be assisted by a simple set of rules providing for an inquiry of an inquisitorial nature and giving him wide powers, and should have a deputy to sit with him and assist as required. He should also be assisted by counsel instructed by the Treasury Solicitor. But the ultimate responsibility for deciding what evidence should be called, should rest with the Chairman.

Witnesses should have the right of representation during their evidence so that they may have legal advice and assistance if necessary, e.g. as to the admissibility of questions, and so that they may be cross-examined by their counsel to ensure that their story is told in full.

These recommendations would give the Chairman of any inquiry a good deal of power, and it would be important to ensure that he did not destroy confidence in the value of his inquiry by exercising it too firmly. This danger could be largely obviated if there were an opening session at which any person or body would be entitled to be represented and to address the Chairman as to any matter within the terms of reference into which it is suggested that the Chairman should inquire.

Whatever rules of procedure are adopted, an inquiry can only operate satisfactorily if the terms of reference are adequately drawn and cover those issues causing public concern from which an inquiry usually originates. The system whereby a Government Department or Minister is solely responsible for settling the terms of reference into a matter in which that Department is intimately concerned or is under criticism, does not seem satisfactory and should be altered. One suggestion in this respect is that terms of reference should be settled by the Council on Tribunals after consultation with the Ministry and/or other bodies or persons concerned.

MEMORANDUM OF EVIDENCE SUBMITTED BY THE CROWN OFFICE AND THE SCOTTISH HOME AND HEALTH DEPARTMENT

1. The Crown Office and the Scottish Home and Health Department agree enerally with the paper submitted to the Royal Commission by the Treasury Solicitor but wish to comment on its Scottish application in the following three respects.

Position of the Scottish Law Officers

2. Section 3 of Part IV (Conclusions) of the Treasury Solicitor's paper deals with participation by the Law Officers and comments that it is at least arguable that the Attorney-General is the right person to appear for the Tribunal in 1921 Act inquiries. The Commission will wish to consider the question of participation by the Lord Advocate and the Solicitor-General for Scotland.

3. The Lord Advocate, like the Attorney-General, is a member of the Government; he is in direct charge of all criminal prosecutions in Scotland except the most minor; he represents the Crown in civil litigation; and he also represents the "public interest" in any litigation in which such an interest emerges. The Solicitor-General is associated with him in these functions.

4. Proceedings before an inquiry are not criminal proceedings, but it could be argued that, where he was not already involved by virtue of another of his functions, the Lord Advocate, acting in the public interest, should act as counsel to the Tribunal, or should nominate counsel for the Tribunal.

5. There have been three Tribunals of Inquiry in Scotland under the Tribunals of Inquiry (Evidence) Act, 1921:

(*a*) 1925—into allegations made against the Chief Constable, Kilmarnock, in connection with the dismissal of two constables.

(*b*) 1933—into allegations of bribery and corruption in connection with the letting and allocation of stances in markets under the control of the City of Glasgow.

(*c*) 1959—into the allegations that John Waters had been assaulted by police officers in Thurso on 7th December, 1957.

In none of these three Tribunals has the Lord Advocate or the Solicitor-General personally taken a direct part. The 1925 inquiry was conducted by the Sheriff who carried out the investigation himself. (This type of inquiry would not arise in future as the matters involved have been covered by subsequent police legislation). In the 1933 inquiry the Lord Advocate appointed a Depute Procurator Fiscal (a local prosecutor in the Sheriff Court, who comes under the control of the Lord Advocate) to make certain inquiries and receive complaints. In the 1959 inquiry the Lord Advocate and the criminal authorities were themselves involved, as the main complaint was attributed to a failure by the Procurator Fiscal to take criminal proceedings against the police officers concerned. In those circumstances the Tribunal was appointed by the Secretary of State for Scotland and the chairman, Lord Sorn, invited the Dean of the Faculty of Advocates, junior counsel and a solicitor in private practice to act for the Tribunal.

Preparation and Presentation of the Evidence before the Tribunal

6. Section 4 of Part IV of the Treasury Solicitor's paper suggests that his Office is the appropriate organisation to handle a 1921 Act inquiry in England and Wales; and it is accepted that it is desirable that the duty of acting as solicitor to a Tribunal should be undertaken by "an organisation which has not only the members available but the experienced staff as well". There are two organisations in Scotland which might carry out this work—the Crown Office and the Office of the Solicitor to the Secretary of State for Scotland. Both these officers have a legally qualified staff which could carry out the inquiries and prepare the case.

7. The Crown Office, which comes under the direct control of the Lord Advocate, has a wide experience in the preparation of criminal cases and of investigations into matters arising out of the criminal administration. It also takes charge of inquiries into sudden and suspicious deaths, and of public inquiries into aircraft accidents ordered by the Minister of Transport. It has a ready means of inquiry through the Procurator Fiscal service and Procurators Fiscal conduct fatal accident inquiries in their areas. Procurators Fiscal could therefore make inquiry, collect evidence and precognosce witnesses throughout Scotland. This could be done quite independently of the police. The Procurator Fiscal service, although under the control of the Lord Advocate, is not intimately connected in the public mind with the day to day affairs of government. It is, however, closely identified with criminal prosecutions.

8. The Office of the Solicitor to the Secretary of State has duties similar to those carried out by the Treasury Solicitor. It acts not only for the Secretary of State's Departments, but also in Scotland for certain other Great Britain Government Departments including the Treasury. It is, therefore, experienced in dealing with the Government machine and is more closely connected with the day to day affairs of government than the Crown Office. While it has a wide experience of civil litigation and of preparing civil cases for the Lord Advocate and the Solicitor General it does not undertake prosecutions ; that is done by the Crown Office.

9. Either organisation could carry out the duties on behalf of the Tribunal. If either office were in any way involved in the allegations with which the inquiry was concerned the other might act. Neither is entirely independent of the Government, and if there were a case involving both the criminal authorities and a Government Department for which the Solicitor's Office acted it would be possible to appoint a solicitor in private practice as was done in 1959.

Statements and Precognitions

10. Section 8(*a*) of Part IV of the Treasury Solicitor's paper suggests that certain individuals might be made parties to the inquiry and as such should be served with copies of relevant documents affecting them. To make available to other parties, or even to the Tribunal, written advance statements by a witness (a " precognition ") would however, be foreign to Scottish procedure.

11. A precognition is obtained by interrogation of the witness. No person is obliged to give a precognition in Scotland for the purposes of civil proceedings but there are powers to obtain precognitions in criminal proceedings and in certain circumstances these precognitions may be taken before the Sheriff. In criminal proceedings a precognition is taken by the Procurator Fiscal ; in civil proceedings by a party's solicitor. If given on an occasion after the action or proceedings to which it is relevant has been initiated it is, however, privileged to the same extent as if it had been given in the course of the proceedings themselves. Moreover the document and information in it are confidential to the witness and to the legal representatives of the person on whose behalf the information has been given. A precognition is not therefore made available except to the witness and his legal advisers and in particular it is not made available to the court. The information in it has no status in law, it is not binding on the witness and if he gives oral evidence which differs from that in the precognition it cannot be founded on, i.e. the witness cannot be contradicted by statements in it.

12. If the normal Scottish practice were followed precognitions would not be placed in the hands of a Tribunal and only the oral evidence of the witnesses would be before them.

MEMORANDUM OF EVIDENCE SUBMITTED BY Sir LIONEL HEALD, Q.C., M.P.

I find myself in close agreement with John Donaldson. My experience of Tribunals involving personal reputations or conduct is limited to the Vassall case, where I was concerned with the comparatively limited task of looking after the interests of a Member of Parliament who became involved in rather a remarkable way. So far as his interests were concerned, the Tribunal worked out quite satisfactorily but I would not like to say that the system under which the Attorney-General operates is satisfactory where personal matters are concerned.

I did have some useful experience of the tribunal system in a very different matter: that of the Comet Tribunal, in which the machinery certainly operated very successfully, and I believe without any ground for complaint of any kind. I had, in fact, actually ceased to be Attorney-General before the hearing but Mr. Winston Churchill, as he then was, asked me to continue with it. I felt that, in an impersonal matter of that kind, placing the responsibility for the conduct of the proceedings on the Attorney-General was certainly an advantage, but it is to be noted that in that case I was able to satisfy myself at a very early stage that De Havillands were not culpable in any avoidable way according to the knowledge of those days. I was therefore able to work with De Havillands' representatives, and no question arose of any public pressure being exercised.

I feel myself that there is a great deal to be said for having the Treasury Solicitor instruct leading counsel of standing and experience in the relevant field, rather than one of the Law Officers, and I think this might very well avoid some of the more unpleasant consequences of the Vassall case, particularly in relation to the refusal of journalists to give evidence.

I must say I cannot agree with the suggestion that the evidence should not be given in public. This, it seems to me, is an essential ingredient in any system which is going to satisfy public opinion.

MEMORANDUM OF EVIDENCE SUBMITTED BY Sir ELWYN JONES, Q.C., M.P.

1. It would seem clear that from time to time events will occur and matters deemed to be of "urgent public importance" will arise which, at any rate in the opinion of Parliament, will call for an investigation which cannot be carried out by the ordinary processes of judicial and quasi-judicial investigation and which will require recourse to some kind of formal inquisitorial procedure.

2. Such a procedure admittedly has certain obvious defects; the absence of specific charges against named individuals, the inapplicability of the normal rules of evidence and procedure and finally the absence of any appeal from what can be extremely damaging findings. How far can these difficulties be obviated or lessened?

3. One of the problems is that the procedure must be sufficiently flexible to be applicable to a very wide range of inquiries. It must be appropriate to a technical inquiry like that into the loss of the "Thetis", as well as to a complicated factual inquiry like that into the activities of post-war "contact men" conducted by the Lynskey Tribunal.

4. The only solution, in my view, is to give the Tribunal a wide discretion on procedural matters. This is not to say that it should be left without any guidance at all, but rather that the guidance should be in very general terms. Thus it might be desirable to give it an express discretion with regard to such matters as advance notice of the case against a particular person, legal aid and representation, the calling and cross-examination of witnesses, the grant of an early right of reply and as to whether the hearing should be in public or in private. This could perhaps be done by providing for an informal type of summons for directions.

5. In practice these matters are largely within the discretion of the Tribunal already, and there is something to be said for leaving matters as they are. Express provisions may be difficult to draft and to implement and do not always achieve the desired result. The ability and integrity of the Tribunal and those representing parties before it are, I think, a far more effective safeguard than any number of rules.

6. An important procedural problem is raised by the absence in many inquiries of any " adversaries ". The Tribunal is charged with establishing the facts and where the Tribunal has to carry out necessary cross-examination it can give the false impression to witnesses that it is hostile to them, that it has " entered the arena ". This can be embarrassing to the Tribunal and it is obviously desirable that the assistance of counsel should be available to it. But doubts have been expressed whether this counsel should be the Attorney-General.

7. The argument against his appearing stems from, as I understand it, the political character of his office and is put in two ways. Where an inquiry involves the Government or its members, it is said that it may be personally embarrassing for the Attorney-General to take part in it. Even where he is not embarrassed it is then said that justice is not seen to be done if the " prosecutor " is himself a member of what may be the " accused Government " or its Ministers.

8. In my view, the Attorney-General alone should decide and should be left with the discretion to decide, whether or not the degree of embarrassment he might face in a particular case would make it impossible or undesirable for him to take part in it as counsel. He would in any event be accompanied by a team of counsel. Clearly if his own conduct or that of his Department were to be in issue he could not in any event participate. I would hope and expect that the standing of the Attorney-General as Chief Legal Adviser to the Crown, as guardian of the public interest and as head of the Bar, would outweigh any impression of political bias stemming from his membership of the Government. Indeed, his membership of the Government itself could be a great advantage in any case involving governmental affairs.

9. I am not suggesting that the Attorney-General should appear personally in every single case, but rather, that he should have a complete discretion whether to appear or not. Flexibility is essential and a rigid rule that the Attorney-General should never in any circumstances appear personally before the Tribunal would in my view clearly be wrong.

10. The power of the Tribunal to certify for contempt is another matter which has been questioned. However, once it is accepted, as is inevitable, that the Tribunal must have power to compel witnesses, it is difficult to see what alternative there is to the present procedure. If the Tribunal is not to be given power to commit witnesses for contempt, the only other course is for it to refer them to Parliament. This, in my view, is undesirable. As between the present procedure and conferring on the Tribunal a power to commit, the choice is more difficult, but on balance I think that the former is more satisfactory. It enables the question of contempt to be determined by a court and does not involve the Tribunal in what may be a complicated side issue. It also provides for an appeal and for the administrative and legal difficulties arising from the possible premature demise of the Tribunal.

11. Finally, I refer to two other matters which have given rise to difficulties. They are criminal proceedings and appeals. Generally speaking, it is not satisfactory to prosecute people who have given evidence before a Tribunal, as often they and their reputations have already been tried. This, in most cases, must be accepted as the often inevitable consequence of holding a public inquiry. However, it is possible to overcome it to some extent by giving a discretion to the Tribunal not to investigate matters which are more suitable for police action.

12. As to appeals it would, I think, be very difficult to devise any satisfactory system of appeal on questions of fact short of a complete re-hearing. Appeals from courts on questions of fact pose considerable difficulties for appellate

judges who have not had the opportunity of seeing and hearing the witnesses. Where the hearing at first instance is not subject to the normal rules of evidence these problems are increased substantially.

13. Appeals on questions of law are difficult to envisage. If the subject matter of an inquiry was a question of law capable of resolution by the courts, it would not have been submitted to the Tribunal. If questions of law did pose a problem it could be resolved by giving the Tribunal power to state a case. However, I doubt whether this is necessary.

MEMORANDUM OF EVIDENCE SUBMITTED BY THE INSTITUTE OF JOURNALISTS

The Institute of Journalists is the senior society of journalists in this country. It was constituted by a Royal Charter granted in the year 1890. The Institute was a party to the setting up of the General Council of the Press and is represented on that Council.

The objects and purposes of the Institute, as defined by its Charter, include the following:

(*e*) Watching any legislation affecting the discharge by journalists of their professional duties and endeavouring to obtain amendments of the law affecting journalists, their duties or interests.

(*m*) The promotion by all reasonable means of the interests of journalism and journalists.

In discharging the duties imposed by those objects, the Executive Committee of the Council of the Institute, acting on behalf of the Council (which is the governing body), desire to make the following submissions to the Royal Commission on Tribunals of Inquiry.

One aspect of the working of Tribunals of Inquiry has become of particular concern to our members, and indeed to all journalists, since the sittings of the Vassall Tribunal which resulted in 1963 in two newspaper reporters being sentenced to terms of imprisonment for refusing to disclose sources of information.

The protection of journalists' confidential sources was an issue so widely debated at that time that the arguments of both sides must be familiar to the Commission and will need no lengthy restatement now.

The views of those who support absolute protection may be summarised as the belief that without it many people who might otherwise provide important information to the Press will be prevented from doing so by the fear that their identities will be revealed. Therefore the number of such sources will be greatly diminished and newspapers will be forced to rely almost solely on official statements so that much that in the public interest should be revealed will remain hidden. The consequent disservice to the long-term public interest must, it is contended, far outweigh any immediate gain resulting from establishing the truth of a particular case however important that case may be.

Those who oppose absolute protection of sources maintain that to grant it would in effect be to require courts and tribunals to abdicate to individual journalists (some of whom may not be as competent or conscientious as others) the right to assess the trust-worthiness of information.

The Institute fully supports the protection of sources and does not believe that the case for it as summarised above is in any way overstated. However, it also recognises the validity of the counter-argument and therefore offers for the Commission's consideration the following suggested procedure which might resolve the dilemma:

(*a*) Any journalist giving evidence before a Tribunal who is asked a question the answering of which would, in his view, require him to break a confidence should without hesitation inform the Tribunal accordingly.

(*b*) The Tribunal, if sitting in public, should thereupon deliberate *in camera* with the witness present.

(*c*) The journalist should then describe the nature of his source (but without identification) and recapitulate the information given, e.g. "a Senior Executive Officer in the Ministry of told me that ".

(*d*) In the light of this information the Tribunal should decide whether it is essential to the execution of the duty defined by its terms of reference that the journalist's informant should be called upon to give evidence.

(*e*) If the Tribunal does so decide then the journalist should identify his informant but:—

(i) the informant's evidence should be heard *in camera* and

(ii) his name and any particulars that might serve to identify him must remain strictly confidential to the Tribunal and not be revealed by its members at any time.

We appreciate that very rare occasions may arise on which a Tribunal is satisfied that the information given to a journalist represents such a grave breach of the trust reposed in the informant by his employers that the security of the State is threatened by his continued employment in the same post. In such cases the Tribunal should report accordingly and, if deemed necessary by the appropriate authority, be released from its obligation to keep secret the identity of the informant.

It cannot be too strongly emphasised, however, that unless this provision is invoked only for reasons of national security so obviously compelling that few reasonable men would wish to dispute them, the whole purpose of these proposals will have been lost. Certainly, offences against the extraordinarily wide provisions of the Official Secrets Acts or "disloyalty" to a superior, a Government Department or an organisation would not in themselves be sufficient justification.

We would venture to invite the attention of the Commission to the final paragraph (No. 343) of Lord Denning's Report, 1963, (Cmnd. 2152) where Lord Denning writes:

> "I would like to say that I have had the greatest co-operation and assistance from the newspapers and all concerned with them; and not least from those whose practices I hold to be open to criticism."

Such is likely always to be the attitude of the Press towards any tribunals investigating matters that involve the Press, and Lord Denning's tribute therefore encourages us to make the following final observation and suggestion:

The power to compel journalists to disclose sources of information notwithstanding a specific or implied pledge of confidence, is of such importance to the Press as to have become, internationally, a matter of concern. We feel that British practice should be exemplary, and that where a tribunal is charged with a duty that is likely to involve the taking of evidence from journalists, its membership should include at least one journalist.

Two journalists were among the 17 members of the Royal Commission on the Press 1947-49; two also among the personnel of the Lord Chancellor's Committee on the Law of Defamation, 1938-48. Again, a journalist was among the members of the Royal Commission on Divorce 1909, whose duties included consideration of the reporting of divorce suits.

While, obviously, a retired journalist might seem the most suitable person for such service, few journalists cease practice absolutely unless they are incapacitated; but the appropriate organisations could always nominate suitable journalists of the right quality, and from such nominees the authority convening the inquiry could make a choice.

MEMORANDUM OF EVIDENCE SUBMITTED BY THE NATIONAL UNION OF JOURNALISTS

The National Union of Journalists, which with 19,500 members represents the great majority of working journalists in the British Isles, has three interests in the inquiry of the Royal Commission.

The first is a special interest. In 1963, Lord Radcliffe, the Chairman of the Tribunal of Inquiry set up by Parliament to inquire into the Vassall affair, sent certificates to the High Court alleging offences under the Act by three journalists, Mr. Desmond Clough, Mr. Brendan Mulholland and Mr. Reginald Foster in respect of their evidence to the Tribunal. The Court found that they were "in contempt as if of the High Court" and sentenced Mr. Mulholland to six months' and Mr. Foster to three months' imprisonment.

Protests and representations against these sentences both inside and outside Parliament were unavailing and the Home Secretary, Mr. Henry Brooke, declined to recommend the exercise of the Royal prerogative of mercy.

The issue involved in these sentences was epitomised in a statement made by the Press Council, which *inter alia*, said:—

> "The Council expresses its deep anxiety about the severe penalties of imprisonment imposed on two reporters for declining to depart from the journalistic code of honour to respect confidences.
>
> It is vital that newspapers which depend so much on confidential information should continue to be in a position to investigate and ventilate matters of public importance. A precedent has now been established which may hinder the Press in performing this duty.
>
> The two reporters were punished for contempt of court committed under the Tribunals of Inquiry (Evidence) Act, 1921. The Council believes that there should be an early re-examination of the rules which govern contempt, *especially as they are applied under the Act.*" (our emphasis).

The Times of 26th April, 1963 made this comment in a leading article:

> "The Act which came on to the statute book in a curiously unpremeditated fashion, created a formidable instrument of compulsory interrogation with a censorial jurisdiction of some potency.
>
> A Tribunal has the full powers of a court, it can compel the attendance of witnesses and the production of documents, it administers the oath, and although it cannot itself commit for contempt, it can report cases to be dealt with in the High Court.
>
> Yet these powers are exercised without the protection afforded by normal rules of procedure, no charges are preferred, there is no justiciable dispute between the parties, ordinary rules of evidence and relevance do not apply throughout. It is like a powerful locomotive running without rails."

The relevance of the evidence with which the two journalists were concerned to major considerations of national security was certainly, in the opinion of the Union, open to question.

Mr. Mulholland was held to be in contempt for declining to disclose to the Tribunal his sources of information concerning statements that Vassall had been known by his colleagues as "Auntie" and was recognised as a homosexual; that an Admiralty girl typist had decided that no clerk on £15 a week could live honestly in the way Vassall did; and that when Vassall was at Monmouth School he met a man who was to figure prominently in his career at the Admiralty.

Mr. Foster's offence was a refusal to disclose the source of his information that Vassall wore women's clothes on his trips to the West End of London.

These defaults led the Lord Chief Justice to comment: "How can you say there is any dishonour on you if you do what is your duty in the ordinary way as a citizen in putting the interests of the State above everything"

It is not our wish now, when the Vassall affair has passed into history and the two journalists are once again living the lives of free citizens, to raise before the Commission the issue of whether or not journalists should have some statutory or recognised protection against being under compulsion or coercion to reveal confidential sources of information. Indeed, the Union has never made this claim, believing that it is a matter for the individual journalist to reconcile his duty under the law with his professional practice and conscience.

What we desire to say is that, in retrospect, many reasonable people would agree that the sentences were out of proportion to the offences. We do not ascribe this, needless to say, to any prejudice on the part of Lord Radcliffe, or malice on the part of the judges of the High Court, but to the singular nature of the procedure established by the Act.

The Act of 1921 prescribes that "The Tribunal shall have all such powers, rights and privileges as are vested in the High Court, or in Scotland the Court of Session on the occasion of an action in respect of the following matters:

(*a*) enforcing the attendance of witnesses and examining them on oath affirmation or otherwise.

(*b*) the compelling of the production of documents.

(*c*) subject to rules of court, the issuing of a commission or request to examine witnesses abroad".

It continues: "If any person:

(*a*) on being duly summoned as a witness before a Tribunal makes default in attending; or

(*b*) being in attendance as a witness refuses to take an oath legally required by the Tribunal to be taken, or to produce any document in his power or control legally required by the Tribunal to be produced by him, or to answer any question to which the Tribunal may legally require an answer; or

(*c*) does any other thing which would, if the Tribunal had been a court of law having power to commit for contempt have been contempt of that court;

the Chairman of the Tribunal may certify the offence of that person under his hand to the High Court, or in Scotland the Court of Session, and the court may thereupon inquire into the alleged offence, and after hearing witnesses who may be produced against or on behalf of the person charged with the offence, and after hearing any statement offered in defence, punish or take steps for the punishment of that person in like manner as if he had been guilty of contempt of the court."

This portion of the Act creates three anomalies in the law relating to contempt of court. The first is that the nature of a contempt in a superior court (the Tribunal being equivalent to the High Court) is defined by statute. Halsbury's Statutes of England (Vol. 4) observes on this point:—

> "The jurisdiction of the courts (on contempt) does not arise from statute, but rests upon common law."

The second anomaly is that a form of indictment is prescribed (the certification of the offence) whereas according to Halsbury "the jurisdiction of the superior courts (on contempt) to proceed in a summary manner by attachment or committal without indictment or trial by jury has been held to be inherent in the courts themselves and to have existed from the earliest times".

The third anomaly is that the Act prescribes for the High Court itself the procedure by which the trial of the issue shall be conducted (i.e. the hearing of witnesses for and on behalf of the person charged, the hearing of a statement in defence, etc.), which is at variance with the inherent jurisdiction of the High Court on matters of contempt.

This situation undoubtedly arises from an attempt to reconcile the political necessity for furnishing a Tribunal of Inquiry with powers of compulsion and coercion sufficient to enable it to carry out its charge from Parliament and the need to acknowledge the inviolability of the law to intrusions of authority by the executive.

At the least it illustrates the precept that " hard cases make bad law ", at worst it is an example of the interference of the executive in the judiciary.

The second interest of the Union in the Commission's inquiry is a professional one. It is epitomised in the statement of the Press Council that: " It is vital that newspapers which depend so much on confidential information should continue to be in a position to investigate and ventilate matters of public importance. A precedent has now been established which may hinder the Press in performing this duty."

It was held by the High Court on the appeal of Mr. Mulholland and Mr. Foster that they did not enjoy the protection of Section 1(3) of the Tribunals of Inquiry (Evidence) Act, in respect of the legality of the question they were required to answer. The Lord Chief Justice in the case of Clough, however, said, " It would remain open to this Court to say in the special circumstances of any particular case that public policy did demand that the journalist should be immune ".

The Attorney-General said that the principle of public policy which was being contended for by the appeal was that the free flow of news would dry up unless informants could give information to the Press for publication under the cloak of anonymity which could never be removed by a court of law in any circumstances. His answer to this contention, in part, was that the occasions when disclosure might be required by a court of law were so rare that the flow of public information from proper sources was not likely to be affected.

This answer, in our submission, does not meet the point made by the Press Council that " a precedent has been established which may hinder the Press in performing its (this) duty ".

The judgment of the High Court was in respect of proceedings before a Tribunal of Inquiry, and the precedent was, therefore, not of a general but a special nature, and related directly to such issues as might be brought before a Tribunal. By definition, such issues would be of important public policy. Moreover, they would be likely to be issues where the probity and efficiency of public administration was being called into question, or, at the least, the subject of doubt.

In the opinion of the Union it is precisely on such issues as this, where there is likely to be an inclination amongst quarters directly affected to conceal the truth from the public at large, that the Press requires the greatest measure of protection in the performance of its duty of investigation and ventilation.

We can put the issue more concisely in this question: " Would a person in a position of confidence or authority in possession of confidential information of grave public importance which he had reason to believe was being concealed for ulterior and unworthy motives, be inclined to disclose this information to the Press in the public interest, if he knew that the inevitable consequence was the revelation of his name and his action? "

The traditional relationship between the Press and the apparatus of government and law in this country can be expressed in the axiom: " The rights of the Press are the rights of the citizen ".

Because those on trial for contempt were journalists, the legal and public discussion, in this instance, turned on the rights of the Press to preserve the confidentiality of its sources of information. But, of course, any citizen might have found himself arraigned for contempt in the same fashion in the High Court on the certification of the chairman of a Tribunal. Let us suppose a situation

in which a Tribunal is inquiring into a matter of grave public importance and some person in possession of information from a personal source believes that it is in the public interest that it should be made available, and is nevertheless under strict pledge of confidentiality from his informant. Would he, in these circumstances, knowing that were he to refuse to answer the Tribunal on the source of his information he would be in peril of contempt, disclose this information?

The deterrent to disclosure in the performance of their public duty is not merely to the Press, but to all citizens.

We also venture to think that the precedent was prejudicial not only to the Press and to the public at large, but to the effective operation of any future Tribunal of this nature. We can conceive of a situation in which a Tribunal with quite other terms of reference to that of the Radcliffe Tribunal might find it a positive embarrassment. There might well be circumstances in which it would be so anxious to obtain vital information that it might wish to give an assurance to a highly-placed witness that the source of his information would remain secure.

This leads us to our third interest in the proceedings of this Commission—a general interest as an organisation concerned with good government and the public weal.

The Prime Minister, Mr. Harold Wilson, said in the House of Commons on 21st March, 1963, "The first thing we have to think about is whether the whole Tribunal procedure is right.

"In the main, when the issue is not a justiciable one but one of construing the public interest, then it is a question which should be decided by the House and not by the judges.

"When we delegate powers of examining in the public interest and establishing the facts to a judicial tribunal, and where there is a clash between the discovery of truth and the scruples, consciences and principles of some of the witnesses before it, then we ought to have a procedure under which the Tribunal would come back to the House of Commons and ask for instructions."

He suggested the right course was for a Tribunal, in such circumstances, to suspend its activities, report to the House and require an affirmative resolution of the House before the institution of committal proceedings for contempt.

But it may reasonably be asked why, if the suzerainty of Parliament is to be protected in this manner in one respect by limiting the delegated powers of a Tribunal, Parliament should consent to any delegation at all.

If Parliament is the highest court in the land, what requirement is there that it should delegate its authority to an *ad hoc* court composed of members of the judiciary?

Without pretence to being authorities on constitutional law, we ask the question whether it would not be possible for all the powers of a Tribunal of Inquiry to be exercised by Parliament itself.

Some such recourse would remove the objection that the executive is establishing a special form of judicial proceeding, would preserve the position of Parliament as the judge of the public interest, would remove the separation of proceedings for contempt as between a Tribunal and the High Court, and would nevertheless accomplish the purpose of the Tribunals of Inquiry (Evidence) Act which is the subject of your investigation.

Certainly, we are of the opinion on grounds of justice for our members, of protection of the Press in the performance of its duty, and of general public policy, that your Commission, in its wisdom, should commend to Parliament an amendment of the law.

MEMORANDUM OF EVIDENCE SUBMITTED BY JUSTICE

A. General Recommendations

(1) *The Act should be retained*

Cases arise not infrequently when the inquisitorial method is the only way of arriving at the truth.

(2) *We are of the opinion that the procedure should be so as to allow the Tribunal to sit in private*

Where the Tribunal is pursuing what may turn out to be an unfounded though serious allegation against someone, it is very hard on that individual to be, as it were, prosecuted and even persecuted in public if it later turns out that he has done nothing wrong. Owing to the absence of a prosecutor or of a defendant, the issues are blurred and injustice can be caused by a random, though hurtful inquiry, which may turn out to be irrelevant as well as baseless. The Tribunal could sit in closed session and re-open on the same issue if need be.

(3) *Besides the lawyers representing affected parties, there should be an independent advocate, other than the Attorney-General, who should lead for the inquiry*

In the J. H. Thomas inquiry, the Attorney-General was in a very embarrassing position as the inquiry was into the conduct of a colleague whom he erroneously believed to be innocent. This independent advocate should of course be entitled to call on the assistance of the police and should be briefed by the Treasury Solicitor, though remaining free to retain in addition, or in substitution, the services of independent solicitors.

(4) *The Secretary of the Tribunal should act as the liaison between the Tribunal and the various parties*

He should transmit the requests of the Tribunal to one of the parties or to the independent advocate for evidence on particular points, or requests for documents. It can be unfair to make these requests in public as it may indicate that the Tribunal has, at that moment, suspicions which later turn out baseless.

(5) *Except when it is obviously sensible and appropriate, witnesses should not be warned of what they are going to be asked*

But it should be the duty of the Tribunal to safeguard their privacy or their reputation by refraining from asking them in public, in the first instance, about matters which, as referred to above, may turn out to be irrelevant or innocent. For this purpose the Tribunal should have the material to judge whether the witness needs this preliminary protection against the questions which are going to be asked. It should be the duty of all examining or cross-examining counsel to inform the Tribunal that in their opinion the questions at this juncture justify a request for a closed session. The duty should be owed by counsel to the Tribunal even in respect of witnesses not "belonging" to them.

B. Answers to questions put by the Royal Commission

1. In our view an inquisitorial method of inquiry, either in private or public is very necessary.

2. The constitution and procedure need revision especially in the appointment of the independent advocate referred to.

Three seems to us to be the appropriate number for the Tribunal.

3. The existing form seems to us suitable except that in the case of the Vassall Tribunal a less high-powered and more effective inquiry would have come into being if much of the evidence had been first of all heard in private. (See also C.4 below.)

4. We have dealt with the question of possible hardship to innocent persons at some length above.

C. Further General Observations

1. We think that it is not always necessary for the Tribunal's proceedings to assume the procedure of a State trial at all stages.

2. We would prefer to see the Tribunal at many stages inquiring from witnesses and lawyers in a more informal atmosphere—round a table so to speak—especially when they are obtaining basic uncontroversial facts.

3. We think that the undesirable feature of many of the witnesses appearing to be accused in the dock is largely created by the Tribunal sitting on a dais like the Court of Criminal Appeal. The whole atmosphere is that of a court and it should, in our opinion, be that of an inquiry—Tribunal and parties on the same level, formal opening or concluding speeches only as necessary and an informality of question and answer between the Tribunal and the parties, their lawyers and the witnesses.

4. In respect of B. 3 above, we are of the opinion that, if a Parliamentary Commissioner is appointed, he could deal with and settle, at an early stage, some matters which might otherwise be capable of blowing up into a major scandal. It should be one of the powers and duties of the Parliamentary Commissioner to recommend that a matter which had been referred to him should be investigated by a Tribunal of Inquiry.

5. We do not think that we can assist you by oral evidence unless you think otherwise, though the Chairman of our Executive Committee was Secretary at the first Budget Leakage inquiry before the war and could perhaps help you as to the difficulties the Tribunal experienced in that inquiry.

MEMORANDUM OF EVIDENCE SUBMITTED BY THE LAW SOCIETY

Introductory

1. This memorandum is submitted by the Council of The Law Society in response to an invitation by the Royal Commission on Tribunals of Inquiry set up under the Chairmanship of The Right Hon. Lord Justice Salmon, with the following terms of reference:—

> "To review the working of the Tribunals of Inquiry (Evidence) Act, 1921, and to consider whether it should be retained or replaced by some other procedure and, if retained, whether any changes are necessary or desirable; and to make recommendations."

2. The Council would be pleased to tender oral evidence, if so desired by the Royal Commission, in amplification or support of the observations contained in this memorandum, and they have no objection to the publication of all or any part of the evidence submitted by them.

3. The Council were asked, in addition to giving their general views, to comment upon particular aspects of the inquiry specified by the Royal Commission. Paragraphs 4-7 deal with these particular points.

Whether or not an inquisitorial method of inquiry either in private or in public is necessary

4. (*a*) The Council take the view that some form of expeditious judicial inquiry is necessary to deal with the kind of investigation which from time to time has been dealt with under the provisions of the Act. Having considered certain alternative forms of inquiry including one based upon the accusatorial system, which would involve the preferment and technically the prosecution of a charge or charges against the principal characters whose conduct is under inquiry, the Council believe that in principle such inquiries should continue to be based upon the inquisitorial system, but that the system which currently operates within the terms of the Act should be subject to reform along the lines outlined in this memorandum.

(*b*) The question of whether such an inquiry should be conducted in public or in private has been the subject of anxious consideration. In this connection the Council have assumed that no question arises at all upon the need to preserve the practice of conducting in private an inquiry or part of an inquiry where it is desirable in the interests of national security so to do. Their concern has been with the problem of preserving a keen and healthy public interest in the inquiry, but at the same time ensuring that it is conducted with justice to individuals who become involved.

The opinion of the Council is that in general the inquiry should be held in public, on the ground that, particularly where there is anything in the nature of a public scandal and persons in high places may be involved, it is vital that justice should be seen to be done, and that no suspicion should be allowed to be created that things are being "hushed up". The Council, however, consider that the discretion to hear evidence in private which the Act now permits a Tribunal to exercise should be less restrictive and should not be exercised in practice only in respect of evidence likely to affect questions of national security.

In some cases, for example, those in which the character or reputation of an innocent person has already been debased by rumour, gossip, or other ill-founded comment, the witness will be anxious that the evidence given before the Tribunal in answer to such defamatory accusations attracts the widest publicity.

Conversely, others, for contrary reasons, will wish to ensure that the utmost privacy is attached to such evidence. To balance the interests of justice to individuals, with the need to keep the public properly informed, the Council consider that the Tribunal should have the right to sit in private, not only in the interests of national security, but also upon request, or of its own volition, in cases where the Tribunal is satisfied that *prima facie* unmerited hardship might otherwise result to a witness before the Tribunal. Such evidence would be open to disclosure in the Report and the Tribunal could itself defeat any abuse of the exercise of such discretion by reserving to itself the right to release for immediate publication evidence given in private which it was afterwards satisfied could and ought to have been given in public, and, at any stage, by reverting to a hearing in public.

The Constitution of and the Procedure followed by recent Tribunals

5. (*a*) While the constitution of the Tribunal is not regulated by statute or other authority, the recent practice has been to appoint as members of the Tribunal eminent lawyers with a judge who holds or has held high judicial office as Chairman. The appointment of the members of the Tribunal has hitherto fallen to the duty of the Secretary of State for the Home Department. On no occasion in the past, so far as is known, has the constitution of a Tribunal given rise to criticism and only those of eminence and of the highest standing in the legal profession have been appointed to serve. Nevertheless, the Council believe that the authority which provides for the setting up of a Tribunal should also provide for its constitution and should especially provide that the Chairman must be a person who holds or has held high judicial office.

(*b*) The Council understand that the procedure adopted by Tribunals set up under the Act is not necessarily uniform:—

(i) In the proceedings before the Bank Rate Tribunal, the Treasury Solicitor, who was responsible for the pre-hearing arrangements and the taking of proofs of evidence of potential witnesses, either invited witnesses to make statements, with or without their solicitors being present, or invited solicitors known to be acting for them to prepare and to submit draft proofs. Where a witness was interviewed by the Treasury Solicitor, and a statement taken, a problem sometimes arose as to whether the witness should be warned against answering questions where the answers might have been incriminatory. Where witnesses before the Tribunal were legally represented, the cost of such representation and of obtaining prior legal advice was met personally by those so represented.

(ii) In the proceedings before the Vassall Tribunal, the preliminary preparation was conducted in a manner similar to that followed in proceedings before committing justices. Witnesses were invited to attend upon the Treasury Solicitor with their legal advisers, and were interviewed in the presence of and under the advice of their own legal representatives. A distinctive feature of the Vassall Tribunal was its decision to recommend that the expense of legal representation of some of the witnesses be paid.

(iii) A feature common to both procedures was the absence of notice of allegations contained in a statement by one witness adverse to the interests of another and in support of which the first witness would be expected to give evidence before the Tribunal. Thus, no opportunity was given to check the accuracy of the statement, to take instructions upon it, or to inquire into the credibility of the adverse witness, or to seek out and tender evidence in rebuttal.

(iv) The Council have considered the desirability of requiring the Treasury Solicitor to provide, in advance of oral evidence before the Tribunal, for the information of witnesses, copies of statements adversely affecting them and of other documentary evidence. They appreciate the possible implications of such a procedure, including the need to ensure that a witness who made a statement would enjoy the same immunity and privilege as that extended by Section 1(3) of the Act to oral evidence before the Tribunal. The Council are of opinion that, after a witness has made his statement, copies of proofs of evidence of other witnesses relating to matters alleged against him, and likely to be the subject of investigation by the Tribunal, and of other relevant documentary evidence, should be provided by the Treasury Solicitor for the information of the witness prior to his appearance before the Tribunal, and that the adoption of this procedure would have benefited the inquiry conducted both by the Bank Rate Tribunal and by the Vassall Tribunal.

Alternative forms of inquiry which might have been used to deal with the matters with which recent Tribunals have been concerned

6. The Council do not consider that an alternative form of inquiry would have been appropriate to deal with the matters with which recent Tribunals have been concerned and they believe an inquisitorial Tribunal set up by Parliament, and Parliament alone, is the appropriate method of dealing with such matters, although with modifications to the provisions of the Act as suggested in this memorandum.

The extent to which innocent persons may be caused hardship and suffering through publicity and expense by being involved in proceedings before Tribunals

7. The Council have already touched upon this problem in paragraph 4(*b*). It is no doubt the case that hardship and suffering through publicity will in some instances have resulted from the airing of views and opinions and the publication of comment before the Tribunal begins its investigation. In those cases, a civil remedy in respect of defamatory matter may be invoked (except where the publication has taken place under Parliamentary privilege) and the Tribunal used as an additional means of exculpation. In other instances, however, hardship and suffering may first arise out of evidence given before a Tribunal, implicating a person not present before the Tribunal and perhaps having no right to be present. Thus, the reputation of a person can be impugned by another, without challenge by that person and within the privilege afforded by the Act.

Further hardship may be suffered by the procedure which (with certain notable exceptions in the Vassall Tribunal case) requires any person, innocent or otherwise, personally to meet the cost of legal representation.

Proposals are made in paragraphs 9 and 10 for mitigating hardship and suffering of this nature, by granting rights of legal representation to every person likely to be affected by the findings of a Tribunal, and that those persons, subject to safeguards, be allowed their reasonable costs of legal representation.

Additional Proposals by the Council for Changes in the Existing System

8. *Rules of Procedure.* There is no code of procedure applicable to proceedings before Tribunals of this type. While it is desirable that the proceedings should not be subject to the application of strict and inflexible rules of procedure, the Council consider that the Act should make provision for prescribing rules designed to outline the procedure, to standardise it, to provide for legal representation and the procedure relating to the examination of witnesses, to provide for discovery of documents, to deal with the award and the assessment of costs, and to regulate the general conduct of the proceedings. These rules should be made available for publication.

9. *Representation.* A Tribunal has power under the Act to authorise the representation before it by counsel or solicitor or otherwise, of any person appearing to it to be interested. In recent inquiries the discretion vested in the Tribunal to authorise representation has been generously exercised, but the Council believe that any person called as a witness, or likely to be affected by the proceedings or findings of the Tribunal, should have an absolute right to be legally represented before it, subject to the discretion of the Tribunal to refuse representation limited to those cases in which the Tribunal is satisfied that a person is not likely to be materially affected by the proceedings or its findings. Any person approached by the Treasury Solicitor as a potential witness should be informed at that time of his prospective right to legal representation.

10. *Cost of Representation.* No provision is made in the Act for indemnifying those involved in the costs of legal representation before the Tribunal. In the proceedings before the Vassall Tribunal payments or contributions *ex gratia* were made in respect of the costs of some of the witnesses, but this was exceptional and outside the provisions of the Act.

As a general principle, the Council consider that a person entitled to be represented before a Tribunal should be entitled equally to be paid from public funds the cost of such representation. It has to be recognised that the majority of witnesses called before a Tribunal have no option but to submit themselves at the inquiry, at what may be considerable expense to them and, in natural justice, it seems to the Council that such persons should, in general, be entitled to be paid their costs and that the Rules of Procedure should make provision for costs to be agreed with the Treasury Solicitor or, in default of agreement, to be taxed by a Taxing Master of the High Court. The Tribunal should however have power, in the case of any particular witness, to order that witness to make a contribution towards or to refund in full as the Tribunal may decide, the costs of his representation paid out of public funds. For example, the Tribunal might exercise this power in the case of a witness whom it had considered was guilty of some impropriety which had given rise to the inquiry, or a witness who had employed counsel, or leading counsel, throughout the proceedings to an extent unwarranted by the nature of the interest of that witness in the matter.

Function of the Attorney-General

11. The function of the Attorney-General in connection with inquiries set up under the Act is to assist the Tribunal in the discharge of its inquisitorial duties, and to act, with the Treasury Solicitor, upon the directions of the Tribunal. The Council wish to emphasise that in no case does it appear that any Attorney-General has ever been found to be wanting, when appearing before such a Tribunal, in the full and proper discharge of his duty to the public and in his representation and protection of the public interest, and successive Attorneys-General have maintained that their discharge of this duty is in contradistinction to the duty of representing and protecting the interests of the Government.

The Council consider, however, that it must necessarily be difficult for the lay public fully to appreciate that in inquiries before a Tribunal of this kind, the Attorney-General is not also concerned (albeit in special cases) with representing the interests of the Government of which he is a member, particularly where it is the conduct of a Minister or other senior member of the Government which is the subject of the inquiry. In such a case the Council could well understand also

the embarrassment a Law Officer of the Crown might feel if he were under an obligation to take part directly in the presentation of a case " against " a colleague summoned to appear before the Tribunal.

Though the argument may be a fine one, the Council believe that on balance it is better that the Attorney-General should not have the conduct of the presentation of a case before the Tribunal and that in all cases the Tribunal should direct the Treasury Solicitor to instruct independent counsel in practice at the Bar. The Council would not go so far as to suggest that independent solicitors should be employed and they consider that the Treasury Solicitor is the appropriate agent of the Tribunal.

Function of the Tribunal

12. The Council consider that the principal function of the Tribunal should continue to be the finding of facts and, if the terms of reference to the Tribunal so provide, to make recommendations.

Since the function of the Tribunal is basically inquisitorial, the Council appreciate that the Tribunal itself, through counsel, should take the leading part in eliciting information from witnesses, but the Council are of opinion that the legal representatives of witnesses subject to interrogation, by or on behalf of the Tribunal, should be allowed within reason a full right of examination and re-examination of their own clients and cross-examination of other witnesses.

The Council suggest that while the terms of reference to the Tribunal should be concise, they should indicate with sufficient particularity the nature of the inquiry to be undertaken. In order that witnesses appearing before the Tribunal may have an opportunity, or a further opportunity, before the taking of evidence begins, of appreciating the nature of the inquiry, as well as to make the matter clear to the public, it would be helpful if, at the opening of the inquiry the Tribunal or counsel representing the Tribunal were to outline the scope and extent of the inquiry. There could then be extended to those concerned, or to their legal representatives, an opportunity if they so wished of making a brief preliminary statement.

Power to Compel Disclosure of Information

13. As a general principle the Council support the continuance of the powers of a Tribunal, comparable to those of the High Court, to compel the attendance of witnesses and the production of documents and under penalty for contempt, to compel the disclosure by witnesses of relevant information. In the case of the Vassall Tribunal the journalists who refused to disclose sources of information which it was relevant to the Tribunal to know created a problem. There is difficulty in any proposal for excepting journalists, as a profession, from the ordinary requirements of statutory law. Such an exception could result in the complete defeat of the object of setting up a Tribunal. The Council would not feel it right that journalists as a class should be exempt from the requirement that those appearing as witnesses before a Tribunal should be under compulsion to disclose, either in private or in public, information required by a Tribunal. On the other hand, while, in the Council's view, any Tribunal set up under the Act must have power to compel disclosure of information, the Council would have confidence that the dilemma of witnesses with special problems of this type would always be recognised and that the power would be sparingly used, especially in cases where other sources of information were available to a Tribunal.

Contempt in the face of the Tribunal

14. The Council would favour the retention of that part of the Act which requires the High Court to deal with acts of contempt by witnesses appearing before a Tribunal, upon a reference by the Tribunal, and would not consider it appropriate for an inquisitorial Tribunal to have power to commit for contempt.

Appeals

15. The Council have considered whether or not the findings of a Tribunal should be subject to appeal. They have in mind that the constitution of such a Tribunal will continue to be free of political bias and will continue to be of persons of the highest standing in their profession. Against that background, and in the interests of expedition and finality, the Council are of opinion that no appeal should lie against the findings of a Tribunal.

Summary of Conclusions

16. A summary of the principal conclusions and recommendations of the Council is appended.

17. The Council have been greatly assisted in the preparation of this memorandum by the services on their Committee dealing with this matter of Mr. B. D. Jacobs, Mr. Emrys Lloyd, Mr. R. S. Page, Mr. J. Smeaton, Mr. G. F. Thompson, Mr. H. S. Trembath and Mr. A. M. Welsford, who are not members of the Council, but who have had experience of inquiries conducted under the provisions of the Act or of some other forms of public inquiry. The Council are much indebted to them for all the time and trouble which they have given to this subject.

Summary of Principal Conclusions and Recommendations

	Paragraph
(1) A form of expeditious judicial inquiry is necessary to deal with an investigation into a matter of urgent public importance and the inquisitorial method of inquiry is preferable	4(*a*)
(2) The inquiry should be in public but with a discretion on the part of the Tribunal to hear evidence in private not only in the interests of national security but also in cases where unmerited hardship might otherwise result to a witness	4(*b*)
(3) The statutory authority providing for the setting up of a Tribunal should provide also for its constitution and that the Chairman be a person who holds or has held high judicial office	5(*a*)
(4) After a witness has made his own statement, he should be provided with copies of proofs of evidence of other witnesses relating to matters alleged against him, and of other relevant documentary evidence	5(*b*)(iv)
(5) An alternative form of inquiry would not have been as well equipped to deal with matters with which recent Tribunals have been concerned and an inquisitorial Tribunal set up by Parliament and Parliament alone is the appropriate method of dealing with such matters	6
(6) Hardship and suffering can be caused to innocent persons through publicity and expense by being involved in proceedings before Tribunals. To alleviate such hardship persons materially concerned should have an absolute right of representation and subject to certain safeguards the costs of such representation should be paid out of public funds ...	7, 9 & 10
(7) The Act should provide for Rules of Procedure to be prescribed governing proceedings before Tribunals	8
(8) The Attorney-General should not have the conduct of a case before a Tribunal set up by Parliament and independent counsel in practice at the Bar should be instructed by the Treasury Solicitor on behalf of the Tribunal	11

MEMORANDUM OF EVIDENCE SUBMITTED BY Mr. MARK LITTMAN, Q.C.

1. I have been invited to comment on Mr. Donaldson's memorandum.

2. *Experience.* My only direct experience of Tribunals under the 1921 Act is that of appearing as the junior counsel for the Tribunal presided over by Mr. Justice Lynskey.

3. *Necessity of such Tribunals.* It seems to me that such Tribunals are absolutely essential (albeit upon infrequent occasions) in the public interest. I cannot see how they can possibly function effectively if they are not at least to some extent inquisitorial in character.

4. *Protection of innocent persons.* Many people feel concern as to the effect that such inquiries may have upon the reputations of innocent persons. I appreciate the force of this consideration but I do not think that one should go so far as to say that in *all* cases the inquiry should either throughout or at some preliminary stage be held in private. In *some* cases the inquiry would not serve its proper public purpose unless it were wholly in public throughout. In other cases it may assist the effectiveness of the inquiry for it to be held wholly or partly in private. I see no reason why there should be the same procedure in all cases. I am of the opinion that there should be a discretion vested in the Minister appointing the particular Tribunal and/or in the Tribunal itself to modify the arrangement according to the nature of the particular circumstances of the case.

5. *Effectiveness.* I feel it is important not to lose sight of the need for maintaining and (if possible) improving the effectiveness of such inquiries. One of the things that struck me in the Lynskey Inquiry was the fact that it was not found possible to ascertain the true facts about certain important matters. I think consideration should be given to the possibility of improving the technique of such inquiries from this point of view.

MEMORANDUM OF EVIDENCE SUBMITTED BY Mr. D. H. McLACHLAN, O.B.E.

This is not, I realise, the main matter to be investigated by the Tribunal but I wish to take the opportunity to state a view of it which is different from most of those that I have read since the Vassall case.

The profession suffers from the lack of any authoritative ruling or dictum on the duties of a journalist to his own source—at least I have not heard of one that is generally accepted or referred to. Nor does it seem normal for News Editors or Editors to instruct their reporters and specialists carefully in this matter. The difficulty of doing so was first brought to my notice in the course of the Vassall case in which one of my reporters was involved.

Thinking this over, the following occurred to me, and I have not changed my mind over the intervening years.

1. To protect sources is a working rule of journalists, a kind of restrictive practice or safety regulation. It is recommended and observed because it is found to work. As a general rule, applicable in all cases, it has no more validity than this; though this much is important and will naturally be defended by organised newspaper men.

2. The rule has ethical content only when there is a tacit or explicit undertaking by the informed journalist that the informant will not be revealed. The journalist can say unconditionally "ought not to reveal" only when he has promised not to. Then, unless he has the permission of his informant he should in no circumstances give him away. If he is told that reasons of State or life and death are involved he should put them to the informant.

3. There is no ethical factor, in my view, when as is so often the case the informant has said "off the record", or "you can't quote me". What he is saying, in effect, is that if challenged he will deny having said what the journalist used. I take "off the record" to mean "if you say I told you or attribute it to me, I may deny it".

4. Nor is there necessarily any ethical factor when a public relations or Press officer gives a journalist information for use as "background". He does it to further the interests of his Minister and Ministry; indirectly, perhaps, he may be serving the public interest, but that is often not so. Having given information in an official capacity he should be ready to take responsibility for it: that is to say, he should not mind being revealed as the source, with his consent.

5. Sometimes the informant, if he is an official or political person, will be telling the journalist something only in order to secure certain results. He will be conducting propaganda or giving a deliberate "leak", or flying a kite. He is using the journalist for his purposes. In that situation, I contend, it is quite absurd to speak of a moral obligation in the journalist not to reveal the source. There is nothing ethical in the relationship at all. If it is normally based on a mutual trust, it has been broken.

6. There *are* situations and personal relationships in which the moral duty of the journalist to keep silent is clear. In a reputable and long established institution like the Lobby for example; or in the daily relations between diplomatic correspondents and the Foreign Office or between crime reporters and the police or between City editors and the banks. There the condition of success for all concerned is secrecy, and anyone who betrays the secret of his source is breaking a tacit—it may even be an explicit—promise not to do so.

7. In such cases I would prefer to speak of an honourable journalist being entitled to hide his source if his conscience tells him he should. But I should like to think that he would consult his editor or a senior colleague before deciding that it was his duty to commit contempt of court by refusing information.

8. The Vassall Tribunal unfortunately showed much ignorance of how newspapers work and there was a strong suspicion at the time that it had been set up to teach the Press a lesson. My own view is that one or two papers needed to be taught a lesson after their handling of the case but it was most unfortunate that the rest had to listen too.

9. My recommendation would be:

(*a*) That the phrase "off the record" should be banned to all those who are giving or handling official information. It is misleading and mischievous.

(*b*) That any Government official or Minister or serving officer who wants to take the Press into his confidence should say beforehand either that this is not to be attributed to him or that nothing is to be used except for guidance and advice to editors. "Only for background" is a phrase which has lost all precise meaning and is an invitation to scramble straight information.

(*c*) That the claim of the journalist to be put on a par at all times in this regard with the priest or the doctor is not tenable. Neither by training nor conviction is the average journalist fit to claim such a status. I certainly should not do so and I do not believe that the public has the same respect for newspapermen in general that it has for men of medicine and the church.

(*d*) In cases where the safety of the State is said to be affected, the journalist should be given the opportunity to indicate his source in private. I thought the Vassall Tribunal handled rather clumsily the refusals they had to deal with.

(*e*) I agree with the view expressed to you, I think, by Lord Devlin: that no one can claim complete privilege of silence. Concealment can be honourable and necessary. It will sometimes happen that there was not any source, but no one will want to admit that in public.

MEMORANDUM OF EVIDENCE SUBMITTED BY THE SOLICITOR FOR THE METROPOLITAN POLICE

I feel that first I should make clear that the assistance I can give to the Commission is very limited since I have no experience of any Tribunal to which the Tribunals of Inquiry (Evidence) Act, 1921, has been applied. In the past there have been inquiries into police matters to which the Act applied, for example, the Savidge case and the more recent Waters case, sometimes referred to as the Thurso case. However, no one in my Department has any detailed knowledge of these matters. My Department has been concerned with four recent inquiries which have given rise to the same problems which are mentioned in your letter. In case it is of any assistance, I will refer to them shortly.

The first was the Woolf inquiry set up in December, 1963, by Home Secretary's Warrant. The Report is Command Paper 2319. This was held in private by Mr. Norman Skelhorn, Q.C., now Sir Norman Skelhorn, the Director of Public Prosecutions. He had no power to compel the attendance of witnesses but found this no disadvantage and was satisfied that all the relevant evidence was put before him.

The second inquiry was that held by Mr. W. L. Mars-Jones, Q.C., again in compliance with Home Secretary's Warrant. The Report is Command Paper 2526. Again although it was held in private and Mr. Mars-Jones had no power to compel witnesses or take evidence on oath, he was satisfied that all the relevant evidence which was available was put before him.

The third inquiry was that held by Mr. A. E. James, Q.C., now Mr. Justice James, into the circumstances in which it was possible for Detective Sergeant Challenor to continue on duty at a time when he appeared to be affected by the onset of mental illness. The Report is Command Paper 2735. This was an inquiry set up by the Home Secretary under Section 32 of the Police Act, 1964, which came into force on the 1st August, 1964, i.e. after the other two inquiries had been set up. The Home Secretary had directed under Section 32(2) of the Police Act that the inquiry should be held in public. The Tribunal exercised the powers provided by Section 290, subsection 2 of the Local Government Act, 1933 enabling it to require the attendance of witnesses to give evidence on oath.

The last inquiry with which my Department was concerned was the Evans inquiry conducted by Mr. Justice Brabin. The evidence in this inquiry has been completed but the Report has not yet been published. This inquiry was set up by Home Secretary's Warrant.

It would seem that now Section 32 of the Police Act is in force there are not likely to be any inquiries relating to the police where the application of the Tribunals of Inquiry (Evidence) Act, 1921, is necessary.

These four inquiries have all been lengthy and it has proved impossible for me or my predecessor to attend personally the hearings except on rare occasions. The usual practice has been for one member of the staff to attend throughout to instruct counsel, reporting developments where necessary. I think it is fair to say all the inquiries have revealed the difficulties inherent in this form of proceeding which have been referred to on many occasions, for example in the debate in the House of Lords of the 4th December, 1963. Nevertheless in every case the Commissioner taking the Tribunal has been well aware of the dangers and has sought to do his best to give every opportunity to any witness whose conduct is likely to be criticised, to defend himself and put his case. Despite this, it is true that a number of witnesses, especially those involved on the fringe of the subject matter of the inquiry, have been left with a feeling of grievance.

Dealing with the matters you mention in the third paragraph of your letter, your first question is whether or not an inquisitorial method of inquiry, either in private or in public, is necessary. Two points seem to be involved here. The issue of " in private " or " in public ".

Taking the first point, it is true that some inquiries could be changed into the accusatorial method. For example, in the Evans inquiry I understand that a number of the counsel instructed did consider that it would have been more satisfactory if someone had been given the task of seeking to prove that Evans was guilty of the murder of his wife and child. However, most inquiries would seem, of necessity, to fall into the inquisitorial method. Certainly the first task of the tribunal often is to discover the exact details of the complaint or complaints. It might be possible after this initial inquiry to change the procedure to an accusatorial one. As I see it there are three main advantages of the accusatorial system. First, that it is a method with which lawyers in this country are familiar and are accordingly capable of using to the best advantage. Secondly, the task of the counsel presenting the facts is far simpler than it is in the inquisitorial system where one has the counsel instructed by the Treasury putting arguments both for and against every point and examining and sometimes cross-examining the same witness. On occasions this last point has caused resentment by witnesses, who have perhaps given statements to the Treasury Solicitor, have been called in chief by counsel instructed by the Treasury Solicitor, and then find themselves the subject of attack in re-examination by one of the counsel instructed by the Treasury Solicitor.

The third, and I would think most important advantage, is that the field which the inquiry covers is much more limited and there is less reason for the tribunal to go into side issues.

Among the disadvantages of the accusatorial method would seem to be, first, that in most cases it is impracticable, certainly at the start of an inquiry. It is difficult, if not impossible, to resolve the subject-matter of the inquiry into a specific allegation or allegations. Secondly, an accusatorial method of inquiry would probably be widely misunderstood by the general public. If counsel instructed by the Treasury Solicitor were given the task of proving an accusation, it would be assumed by many members of the public that he and those instructing him believed in the truth of the accusation. Such an inquiry would seem artificial, resembling a students' debate rather than a real investigation. Thirdly, the very fact that the inquiry would be limited to a direct issue would create a danger that the general public might not be satisfied that the whole matter had been probed to the full.

Coming to the second point involved in the question, *viz.* " whether in private or in public ", Mr. James in the Report of the inquiry held by him referred to above, felt strongly that it would have been of assistance to him if he had had power to receive some evidence in private (see Part 6 of the Report). I understand that in the Evans inquiry some counsel considered it would have been of advantage if some witnesses had been allowed to give evidence in private. These were witnesses who probably did not wish it to be known in the locality where they were now living that they had been associated with any of the people directly involved in the inquiry. Many police officers feel that since they could never seek to have their evidence taken in private, because it is obvious that the public would assume that they had something to hide, it is wrong that anyone giving evidence accusing them of mis-conduct should be allowed to give evidence in private. I feel there is considerable force in this argument but I think that in general the tribunal should have a discretion to allow a witness to give evidence in private, even when the general inquiry is directed to be held in public. I also consider that there are a number of inquiries which are better heard in private altogether. The matters for which inquiries are necessary are so varied that it is impossible to rule that all should be heard in private or all in public.

For the reasons set out in Paragraph 1, I have no comment on the second question raised in your letter. I have included such comments as I have on Question 3 in my answer to your question. With regard to Question 4, I think that the dangers of hardship and suffering referred to are now well understood by those taking inquiries and a body of rules of practice is gradually being built up which does something to alleviate such hardship. It seems impossible to devise any system which will satisfy the general public by inquiring in depth into a matter of real public concern without also endangering the reputation of persons, some of whom may be innocent and some may be guilty of only minor errors. In the recent inquiries referred to above, all persons likely to be the subject of adverse comment were either legally represented or given the opportunity of being legally represented. I feel that such persons should know in advance that their legal fees will be paid.

It has been suggested that there should be some right of appeal from findings which are to the detriment of a person and that it is unfair that a witness referred to adversely in the Report has no redress. It must be remembered however that in many criminal trials, witnesses are referred to adversely in the judge's summing up and they have no redress and in fact in these cases they have probably had much less chance of seeking to remove the imputation on their character during the course of the hearing than they would have had if witnesses before a tribunal of inquiry.

MEMORANDUM OF EVIDENCE SUBMITTED BY THE Hon. Mr. JUSTICE MILMO

1. I appeared as junior counsel for Mr. Oliver Poole (as he then was) before the Bank Rate Tribunal, and as leading counsel for Lord Carrington before the Vassall Tribunal. My appearance for Lord Carrington was concerned only with the allegations which reflected on his personal integrity and competence and not with his purely Ministerial responsibility for the acts and/or omissions of his Department.

2. I find myself in broad general agreement wih the memorandum of evidence of Mr. John Donaldson Q.C.

3. I think that there is a need for an instrument such as is provided for in the Tribunals of Inquiry (Evidence) Act, 1921, but it is one which should only be resorted to in very exceptional circumstances when the national interest calls for a most searching investigation.

4. One of the principle objections to inquiries of this kind is that accusations and/or adverse reflections are made against innocent persons who may have to wait many days, if not weeks, before they are afforded an opportunity of

refuting the allegations which in the meanwhile will have received the widest publicity. A possible way of meeting this objection might be to follow the Divorce Court precedent and make it illegal to publish any report of the proceedings prior to the publication of the Report and findings of the Tribunal itself. I do not think that such a prohibition would on balance be desirable.

(i) One of the main reasons for setting up the Tribunal is to restore public confidence and this is best achieved by a public investigation.

(ii) Any such prohibition would have been contrary to the interests of the two "accused" clients for whom I appeared. In each of their cases it was established beyond peradventure at a very early stage of the public hearings that the charges made against them were without substance and ought never to have been made. It is true that their formal acquittal only took place when the Tribunal's Report was published but, as a result of the detailed day to day reporting of the proceedings, their reputations were cleared and their characters vindicated at a very much earlier stage.

(iii) The contemporaneous reporting of the proceedings has, I believe, resulted in at least some important witnesses coming forward whose evidence would otherwise not have been available to the Tribunal.

5. Neither of the Law Officers should, in my view, appear before any Tribunal in which the personal conduct or reputation of any of their political colleagues in the Government is likely to be called in question. My reasons include the following—

(*a*) It is always undesirable that an advocate should be put in a position where he has, or even where he may be believed to have, conflicting interests. Placed in such a position a man may well come to the correct decisions but his chances of doing so are likely to be diminished.

(*b*) In a setting in which the restoration of public confidence is an objective of paramount importance, it is vitally important that nothing should be done which might reasonably lead anyone to suspect a "covering up" operation on the part of the Government of the day. The appearance of the Attorney-General conducting the probe into the conduct of his friends and colleagues is not calculated to achieve this objective and could have the opposite effect.

(*c*) I do not suggest that in any of the Tribunals of Inquiry which have been set up in the past that any of the Law Officers who have appeared have consciously or unconsciously set out to protect members of the Government or their supporters. On the contrary, I think that they have leant backwards to ensure that they should not be open to such criticism and in doing so may well have been less than fair to innocent witnesses whose conduct was irreproachable.

MEMORANDUM OF EVIDENCE SUBMITTED BY THE PRESS COUNCIL

1. The Press Council does not feel that it can offer the Royal Commission any observations on the main question referred to the Commission (i.e. the working of the Act of 1921 and whether it should be retained or replaced by some other procedure) which will not also be made by other persons and bodies that are better qualified to do so. But if the Commission should decide to recommend the retention of existing procedure, the Press Council is anxious that it should consider, as one of the changes that is necessary or desirable, the procedure under Section 1(2), which applies the law on contempt of court to the proceedings of a Tribunal.

2. There is annexed as an appendix to this memorandum the statement issued by the Press Council on the 6th May, 1963 following upon the Vassall inquiry. In the last paragraph the Council expressed its belief that there should be an early re-examination of the rules which govern contempt, especially as they are applied under the Act.

3. The Press Council will not elaborate in this memorandum its criticism of the rules generally because it appreciates that an examination of the rules generally would be outside the scope of the Commission's work. On the assumption, therefore, that the rules are appropriate for ordinary legal procedure, the Press Council desires to submit to the Commission that they are not suitable for the procedure under the Act.

4. Under the ordinary procedure in which issue is joined between two parties, the duty of the court is to decide between them and not to institute inquiries of its own motion. Difficulties about professional confidence rarely arise. Information which a witness has only by hearsay is not normally admissible. Even where it is admissible, the name of the informant is not ordinarily relevant. If, for example, a police officer were asked the name of his informant, the question would probably be disallowed on that ground. If questions are put which cannot be answered except by a breach of professional confidence, the trial judge is usually able to find a solution without invoking the contempt process. But where the proceedings are inquisitorial and the Tribunal receives information of every sort, there is a much greater danger of professional men—doctors, clergymen and journalists among others—being placed in a dilemma of conscience.

5. In the case of a journalist the obligation of secrecy is one that the public interest as well as his own professional code requires him to observe. It is universally accepted as necessary to the process of democracy that there should be a well-informed Press able to comment critically on public affairs. Recognising this, members of the public will talk freely to a journalist on the understanding not merely that he does not disclose the source of his information but often also that he does not print the information at all. It is the factual knowledge that a journalist gets in this way that enables him to comment fairly and intelligently; and sometimes to refrain from criticism or comment which would otherwise seem to be called for. The Press Council is sure that it could, if the Royal Commission so desires, arrange for journalists of great experience and the highest repute to testify to the need for secrecy not only in the interests of the profession, but in the public interest as well.

6. The Press Council respectfully hopes that the Royal Commission will not consider this question simply in relation to the circumstances of the Vassall inquiry. In that case there was a degree of journalistic irresponsibility which, as is shown by the statement in the appendix, the Press Council condemned at the time. The Bank Rate Tribunal, by which no journalist was found to be at fault (see para. 22 of the Tribunal's Report), is a better example of the ordinary dilemma in which the journalist is placed; see the questioning of Mr. Bareau at paragraphs 168-171 of the Minutes of Evidence and of Mr. Smale at paragraphs 9, 80 and 981. In these instances the journalists gave way. But the question is not merely whether the public interest demands that the threat of imprisonment should be used to quash conscientious objections. The question is also whether, in the long run, it is in the public interest that objectors should be forced to give way. For the sake of information which it is possible may be of only peripheral value in a particular inquiry, a principle is breached; and because of the breach public men will become afraid to make use of the power of the Press in the way in which it should be used—in letting light into places that would otherwise be kept dark.

APPENDIX

NOT TO BE PUBLISHED BEFORE 0030 HOURS TUESDAY 7TH MAY 1963

GENERAL COUNCIL OF THE PRESS

Ludgate House, 110-111 Fleet Street, London, E.C.4

Tel.: FLEet Street 1248

PRESS RELEASE No. 163/63.

CONFIDENTIAL UNTIL RELEASED FOR PUBLICATION

The Press Council, in special session on Monday, 6th May, 1963, resolved to issue the following statement:

1. The Press Council has considered the report of the Tribunal appointed to enquire into the Vassall case, the circumstances which led to its appointment and the effect of its findings.

2. The Press has the right and indeed the duty to investigate and comment on matters concerning national security, but the Council condemns the publication, in some London newspapers, of false information and damaging innuendos based on nothing more than conjecture, assumption and speculation. It regards these reports as a serious lowering of the standards of a responsible Press.

3. The Council, however, expresses its deep anxiety about the severe penalties of imprisonment imposed on two reporters for declining to depart from the journalistic code of honour to respect confidences. It is vital that newspapers, which depend so much on confidential information, should continue to be in a position to investigate and ventilate matters of public importance. A precedent has now been established which may hinder the Press in performing this duty.

4. The two reporters were punished for contempt of court committed under the Tribunals of Inquiry (Evidence) Act of 1921. The Council believes there should be early re-examination of the Rules which govern Contempt, especially as they are applied under this Act.

MEMORANDUM OF EVIDENCE SUBMITTED BY H.M. PROCURATOR-GENERAL AND TREASURY SOLICITOR (IN CONSULTATION WITH THE HOME OFFICE, THE LORD CHANCELLOR'S DEPARTMENT, AND H.M. TREASURY)

PART I

Introduction

1. Although the immediate occasion of the passing of the Tribunals of Inquiry (Evidence) Act, 1921 (hereinafter referred to as the 1921 Act) was a Parliamentary agitation for the setting up of a tribunal to inquire into alleged irregularities in winding up contracts by the Ministry of Munitions, yet the Act is of a procedural nature only. It puts powerful sanctions in the hands of a Tribunal, once it has been appointed, to compel witnesses to attend its hearings, to produce documents and to be examined on oath or affirmation. A Tribunal must first be appointed pursuant to a resolution by both Houses of Parliament, that it is expedient that such a Tribunal should be established for inquiring into a definite matter described in the resolution as being of urgent public importance. It does not necessarily follow that the 1921 Act shall apply to a Tribunal so appointed, but it is provided (S.I.) that the instrument or warrant of appointment may apply the Act to the Tribunal, and if this is done, then the Tribunal has the powers, privileges, rights and duties imposed on such a Tribunal by the Act. The appointment of the Tribunal is normally evidenced by warrant signed by a Secretary of State. The terms of reference of the Tribunal are set out in the resolution setting up the Tribunal and can therefore be debated.

2. The Treasury Solicitor's Department has not been concerned with the inquiries conducted by all the Tribunals to which the 1921 Act has been applied. There appear to have been sixteen such inquiries in all, which include three arising out of allegations made with regard to matters arising in Scotland. None appears to relate to matters arising in Wales. The former would not be a responsibility of the Treasury Solicitor's Department. The Treasury Solicitor's Department appears to have been concerned with eleven of the English inquiries, namely:—

1921 Destruction of documents by Ministry of Munitions officials.

1925 Case of Major Sheppard; Inquiry into conduct of Metropolitan Police.

1928 Charges against Chief Constable of St. Helens by the Watch Committee.

1928 Case of Irene Savidge questioned by the Metropolitan Police at New Scotland Yard.

1936 Budget Leakage Inquiry.

1939 Investigation and report into all the circumstances surrounding the loss of the "Thetis".

1943 Hereford Juvenile Court Justices proceedings in case of Craddock and others.

1944 Newcastle-upon-Tyne—inquiry into administration of Fire, Police and Civil Defence Services.

1948 Bribery of public servants, including Parliamentary Secretary of Board of Trade (The Lynskey Inquiry).

1957 Inquiry into allegations of improper disclosure of information relating to the raising of the Bank Rate (The Bank Rate Inquiry).

1962 Allegations concerning circumstances in which offences under the Official Secrets Act were committed by William John Christopher Vassall (The Vassall Inquiry).

Most of the papers relating to the inquiries held before 1936 have now been destroyed. Some but not all of the papers relating to the Budget Leak Inquiry and subsequent inquiries in which the Treasury Solicitor has been concerned are still in existence.

3. Although the 1921 Act imposes powers and duties on the Tribunals to which the Act is applied, the Act itself contains very little to guide the Tribunal with regard to the manner in which it should conduct its proceedings nor is there power reserved in the Act for making regulations governing the procedure. There is a procedure provided by Section 1(2) of the Act whereby witnesses who fail to attend on being duly summoned, or who refuse to answer questions or produce documents, can be referred to the High Court or Court of Session for punishment in contempt proceedings. There is the provision rather oddly expressed in Section 2(*a*) of the Act with regard to allowing the public to be present at the procedings of the Tribunal unless in the opinion of the Tribunal it is in the public interest expedient not to do so. There is also the provision in Section 2(*b*) of the Act with regard to legal representation of persons appearing to the Tribunal to be interested. This, however, is the extent of the guidance to be found in the 1921 Act.

4. When the inquiry is completed, the Tribunal reports to the Secretary of State by whose warrant it was appointed.

5. The procedure therefore at these 1921 Act inquiries has necessarily had to be devised and determined by the Tribunals themselves, bearing in mind, of course, their terms of reference, and the powers and duties conferred on the Tribunals by the 1921 Act. A recognisable procedure has gradually been evolved, derived partly from experiment and partly from experience, with the result that there is today a procedure which though not binding on any new Tribunal that may be appointed, yet serves as a valuable precedent when any new Tribunal is appointed. It is proposed to outline and explain the present procedure for 1921 Act inquiries in England and Wales in Part II of this memorandum, to comment on the criticisms of the 1921 Act inquiries in Part III and in Part IV will be found certain conclusions.

6. This memorandum has been prepared in consultation with the Home Office, the Lord Chancellor's Department, and other interested Government Departments.

PART II

The Current Procedure in England and Wales

1. *Treasury Solicitor's Instructions*

The Treasury Solicitor is not officially instructed until the necessary resolution embodying the terms of reference of the Tribunal has been passed by both Houses of Parliament, and the Warrant appointing the members of the Tribunal and apply the 1921 Act is ready for signature. The Treasury Solicitor's function is to act as solicitor to the Tribunal when appointed notwithstanding the fact that there may be Government Departments or Ministers for whom the Treasury Solicitor normally acts, who are concerned directly with the inquiry. For example, all recent Attorneys-General have regarded themselves as being directly concerned with all 1921 Act inquiries in England, since the Attorney-General represents the public interest. In inquiries affecting the integrity of members of the Government there could be a conflict of interest between the Tribunal and the Attorney-General (see further Part IV, paragraph 3) for whom the Treasury Solicitor normally acts. In practice the risk of this potential area of conflict is diminished by the measures referred to in paragraph 4 below. It is clearly, however, impossible for the Treasury Solicitor to serve two masters. He is the solicitor to the Tribunal and it is from the Tribunal he must receive his instructions.

2. *The Constitution of the Tribunal*

This is a matter for the Government. The Treasury Solicitor is not concerned with this. It is not usual to announce the names of the persons constituting the Tribunal during the debate on the resolution setting up the Tribunal. In the case of recent inquiries, a judge of a Superior Court has been appointed chairman.

3. *The Treasury Solicitor's responsibility for Investigations*

It is obvious from the above that the Treasury Solicitor must arrange to consult the Tribunal at the earliest possible opportunity. At their first meeting, the Tribunal indicates in broad terms how it intends to conduct the inquiry and the general lines on which the Treasury Solicitor's investigations should commence and follow. The Tribunal's investigations are carried out therefore on its behalf by the Treasury Solicitor, acting in close consultation with the Tribunal itself and with counsel nominated to represent the Tribunal when the inquiry is held. The Tribunal does not itself normally communicate with witnesses or interview or take statements from them. This is the responsibility of the Treasury Solicitor, who is carrying out the investigations on behalf of the Tribunal (see paragraph 7 as to statements). The Tribunal will often direct the Treasury Solicitor to contact certain named witnesses. Statements and documents are fed to the Tribunal by the Treasury Solicitor as they are completed and become available.

4. *Nomination of Counsel*

The counsel who are to appear on behalf of the Tribunal are nominated by the Attorney-General. The latter himself usually leads the team representing the Tribunal. In the Vassall Inquiry there were, in addition to the Attorney-General, a leading counsel, and two junior counsel. In the Bank Rate Inquiry, the Attorney-General appeared with Treasury junior counsel (Common Law) and one other junior. As soon as he receives instructions to act, the Treasury Solicitor requests the Attorney-General to consider the nomination of counsel. The counsel to be nominated by the Attorney-General may be discussed by the latter with the Tribunal, and is also one of the items for discussion at the first meeting of the Treasury Solicitor with the Tribunal.

5. *Secretary and Clerk*

A Secretary is appointed to assist the Tribunal with day to day administrative matters, correspondence and so on. The Tribunal also has a clerk who sits in court with the Tribunal, administers the oath, numbers and records documents and exhibits put in, and attends to other matters normally in the province of a clerk to a tribunal. The Treasury Solicitor's Department normally supplies the clerk.

6. *Appeals to Public for information and to potential witnesses*

It is usually the practice, shortly after the Tribunal has been constituted and a Secretary has been appointed, to put a notice in the Press, inviting witnesses who have information or documents in their possession, to communicate with the Secretary of the Tribunal. The Secretary usually passes the letters received (after submitting them to the chairman for preliminary scrutiny) to the Treasury Solicitor to follow up. An invitation of this nature appearing in the national Press has not in practice produced very much of value in terms of evidence. However, it is thought to serve a useful purpose, as it gives publicity to the inquiry and its sittings as well as an opportunity to individuals to come forward or write confidentially, if desired, to the Tribunal.

7. *Witnesses*

(1) The Treasury Solicitor writes in the name of the Tribunal to persons who it is thought may be able to assist the Tribunal with information or with documents, or with both. The witness is invited to make a statement voluntarily of the matters within his knowledge. He is told that his statement will be given to the Tribunal, but will not be circulated further except on the instructions of the Tribunal. If the witness so desires, the statement will be taken in the presence of his solicitor. All statements are fair copied for subsequent approval, signature and dating by the witness. A copy is given to the witness and his solicitor. The original goes to the Tribunal. The interrogation of witnesses is usually done by a process of question and answer (sometimes over a series of interviews on different days), but if a witness prefers, he can produce a statement and then be questioned on it. This may lead to an amended or supplemental statement.

(2) *Rules of Evidence.* When questioning witnesses, Section 1(3) of the 1921 Act (which states that witnesses are entitled to the same immunities as witnesses before the High Court or Court of Session) has to be borne in mind. A witness therefore cannot be pressed, for example, to make any statement which may tend to incriminate him or disclose any legal advice he may have received. On the other hand the rule of evidence relating to hearsay is not strictly followed. There is no presumption of innocence. Indeed, to follow rigidly the rules of evidence applied by the High Court or Court of Session might defeat the objects of the inquiry which include as well as the ascertainment of the facts, the investigation of rumours and the restoration of public confidence in the administration affected by them. Although Tribunals are not bound by the strict rules of evidence applied by English and Scottish courts, they nevertheless have considerable regard to them, and indeed seem to follow them, whenever it is possible to do so consistently with their duty, to carry out a full and proper investigation of the relevant matters referred to them.

(3) *Defamation.* Sometimes witnesses are concerned about the possibility of being sued for defamation in respect of anything they may say. It has always been assumed that the proceedings of a Tribunal to which the 1921 Act has been applied is covered by judicial or absolute privilege. This has been inferred (it is hoped correctly) from Section 1(1) and 1(3) of the 1921 Act. The witnesses have been so informed. Possible defences of qualified privilege or justification have not been discussed with witnesses.

(4) *Summons to attend and Expenses.* Most of the responsibility of discovering and interviewing witnesses devolves on the Treasury Solicitor once he has received his first general directions from the Tribunal. Witnesses do not attend the Tribunal until required to do so. In order to ensure attendance it is sometimes necessary to serve them with a Summons signed by a member of the Tribunal as provided by Section 1(1) of the 1921 Act. If necessary, conduct money is paid to the witness with the Summons and a witness's reasonable travelling and subsistence expenses are, if claimed, paid out of public funds. Witnesses are in principle only permitted to be present when they give evidence. They are not present when other witnesses give evidence. Some relaxation of this rule is allowed to an interested party, who is also a witness to the inquiry.

(5) *Tribunal decides what witnesses are called.* It has been the accepted view hitherto that the Tribunal, in order to retain complete control of the proceedings, should decide, after considering the statements in the light of their terms of reference, which witnesses should be asked to give oral evidence and what documents should be put in as exhibits to the proofs. The Tribunal also decides in consultation with its legal advisers the order in which witnesses are called. It is open to interested persons to ask the Tribunal to call individual named witnesses, and the Tribunal would normally accede to this request; the witness, however, is still the Tribunal's witness and the Treasury Solicitor is required to take a statement from him in the presence of his solicitor if requested and which will be available to the Tribunal and its counsel before he gives evidence. An interested party therefore has not the right to call witnesses, as for example in aircraft accident and shipping casualty investigations. If he is called in support of an interested person, who has been given the right of legal representation, he would nevertheless be examined in chief by counsel for the Tribunal and leave of the Court would probably be given to other counsel interested to question him afterwards.

(6) *Allegations or charges against individual witnesses.* It may appear to the Tribunal either before the hearings commence or at some time during the hearings, that a witness should have an opportunity of answering or explaining evidence given to the Tribunal which in the Tribunal's opinion merits investigation and expressly or impliedly charges an individual with, for example, neglect of duty, negligence, or misconduct, or other behaviour of a prejudicial character. If time and the circumstances permit, a practice is followed, and was employed in the Vassall Inquiry, for counsel for the Tribunal to prepare a list of the allegations made against the witness. The list of allegations (which is submitted to the

Tribunal for approval) is handed to the witness with copies of any relevant documents (including on some occasions statements made to the Tribunal by other witnesses) in sufficient time, before he gives evidence, so as to enable him to consider the nature of his replies. If the witness has already given evidence, he can be recalled. If he has not given evidence, he is permitted to be present when the evidence implicating him is being given and he himself or his legal representative is permitted to question the witnesses.

(7) *Procedure for certification of persons for contempt.* The only Tribunal, so far, which has found it necessary to certify a person for contempt under the procedure to be found in Section 1(2)(*b*) of the 1921 Act is the Vassall Tribunal. In these proceedings three journalists were certified to the High Court for refusing to answer questions as to their sources of information. Prior to being so certified the Tribunal had given them time to consider their position with their advisers, but they still refused to answer certain questions. The procedure, though somewhat ponderous, worked, and was by way of motion for writs of attachment or committal to a single judge of the Queen's Bench Division of the High Court, with supporting affidavits which exhibited the chairman's certificates and extracts from the daily transcript of evidence in which the questions and answers of the persons in contempt were recorded. There were also exhibited extracts from the transcript and newspaper reports to demonstrate the relevance of the question. The Attorney-General (who was one of the counsel to the Tribunal) appeared in support of the motion.

(8) Witnesses are often questioned by members of the Tribunal after the completion of the evidence. An opportunity is given for re-examination arising out of the witness's answers.

8. *Crown Privilege*

It is not the practice to claim Crown privilege for documents which are relevant to the Tribunal's proceedings. If there are objections on security grounds to the production of documents as in the Vassall Inquiury, then the Tribunal is asked to sit *in camera* pursuant to the powers in Section 2(*a*) of the 1921 Act.

9. *Preliminary Sitting*

It has become the practice for Tribunals to have a preliminary sitting, before the main hearings commence. The chief purpose of the preliminary sitting (notice of which appears in the Press and is given to persons known to be concerned with the inquiry), is (1) to give particulars of the venue, (2) the date when the Tribunal will commence the hearings, (3) the hours of sitting, (4) the question of private sitting (if any), (5) to give particulars of the procedure which the Tribunal intend to follow at the hearings and (6) to advise all witnesses that they are the Tribunal's witnesses and that it is the Treasury Solicitor's duty as the Tribunal's solicitor to take a statement from them and place that statement with any documents before the Tribunal. Applications for the right of legal representation are also received. There has always proved to be tremendous pressure to commence the hearings at the earliest possible date, however complicated the issues may be, and a full and complete investigation on that account necessary. It is usual for the Tribunal to hold the preliminary sitting about a fortnight after the Warrant of Appointment has been signed, and to commence the hearings ten days or a fortnight after the preliminary sitting. This is the absolute minimum of time required for the assembling of sufficient statements and evidence to enable the Tribunal to start work, and for briefing counsel, quite apart from organising the accommodation of the Tribunal, witnesses and counsel in some appropriate building. The investigation by the Treasury Solicitor has to continue notwithstanding the fact that the Tribunal has commenced to sit.

10. *Representation Costs*

Section 2(*b*) of the 1921 Act provides that a Tribunal

> "Shall have power to authorise the representation before them of any person appearing to them to be interested, to be by counsel or solicitor or otherwise, or to refuse to allow such representation."

It is the usual practice for Tribunals to consider applications made for representation at one of their sittings, or the application can be made by letter at any time addressed to the Secretary of the Tribunal. Although the right to representation may be granted, it does not follow that the legal costs of the person represented will be met from public funds. In the Bank Rate and earlier inquiries, no recommendations were made by the Tribunal with regard to costs. In the Vassall Inquiry, the Tribunal made specific recommendations at the request of the Home Secretary with regard to the payment of the costs of each of the persons to whom they had granted the right of legal representation. These recommendations were accepted by the Government subject to taxation by the Chief Taxing Master failing agreement with the Treasury Solicitor, and *ex gratia* payments were made equivalent to the agreed or taxed bill of costs.

11. *Procedure*

(1) *Opening Addresses by Counsel.* The case for the inquiry is opened by counsel instructed by the Treasury Solicitor for the Tribunal. It is not usual in the opening address to cover matters in detail, nor to refer except generally to the witnesses it is intended to call. When the Tribunal opens it may well be that some witnesses have not been seen or statements taken, or the existence of vital witnesses and documents may be unknown. Counsel will naturally refer to the terms of reference, the debate in Parliament setting up the Tribunal, but, at this stage, it would be unusual to frame any accusations or charges against individuals. Counsel representing other persons interested, are not given the right to make an opening address at any stage in the inquiry.

(2) *Examination of Witnesses.* This follows the termination of the opening address, evidence being given on oath or by affirmation administered by the Clerk of the Court. A different procedure was adopted in the Lynskey and Bank Rate Inquiries from that followed in the Vassall Inquiry. In the former, the witness was examined in chief from the statement taken by the Treasury Solicitor and already handed to the Tribunal by the Attorney-General or counsel appearing with him. At the conclusion of the examination in chief, counsel on behalf of the Tribunal changed his role and cross-examined the witness. If the witness was legally represented, he was then re-examined by his counsel and again by counsel for the Tribunal, if necessary. Finally the Tribunal usually questioned the witness. In the Vassall Inquiry, the Attorney-General had with him another leading counsel as well as two junior counsel. Much of the proceedings were *in camera,* and it was arranged that one of the junior counsel (who had familiarised himself with the details of the particular part of the inquiry with which the witness was concerned) should examine the witness in chief from his statement and that the witness should then be cross-examined either by the Attorney-General (who took the lion's share) or the other leading counsel. Re-examination by the junior counsel and questioning by the Tribunal followed. In the case of witnesses who were legally represented, the procedure was reversed so as to let their counsel conduct the examination in chief and re-examination. The Tribunal also permitted counsel of witnesses who were legally represented to put questions to other witnesses with whose evidence their client was concerned. This, however, was not done in the Bank Rate or Lynskey Inquiries. Witnesses may be recalled by the Tribunal and examined and re-examined on fresh material which may emerge during the hearings of the Tribunal.

(3) *Closing speeches.* All counsel representing interested persons are permitted to make closing speeches, in an order agreed mutually between them. Counsel for the Tribunal (i.e. the Attorney-General in the Lynskey, Bank Rate and Vassall Inquiries) makes the final closing speech, drawing attention to the main issues and the more important evidence or lack of evidence that has emerged. In view of the fact that there is a shorthand transcript of the whole of the proceedings available to the Tribunal, it is not necessary to address the Tribunal at length on the evidence. Counsel for the Tribunal does not suggest the answers to the

questions contained in the Tribunal's terms of reference which is what the Tribunal is required to decide. Nevertheless, counsel for the Tribunal may put forward alternative views or theories, particularly where there is a conflict of evidence.

12. *Parties*

Unlike the procedure for formal investigations into marine casualties or public inquiries into aircraft accidents, there is no procedure whereby persons are made parties to the inquiry and on whom notice of the investigations with particulars of the questions to be answered by the Tribunal is served. There is no comparable practice whereby interested persons are as of right given copies of documents available to the Tribunal. An individual witness is given a copy of his statement and exhibits thereto, and in practice is given copies of any documents relevant to the evidence he has to give.

13. *Public and Private Sessions*

Section 2(*a*) of the 1921 Act has been interpreted as requiring Tribunals to sit in public unless exceptional considerations, e.g. security, necessitate sessions *in camera,* notwithstanding the reluctance of some witnesses to give information and evidence in public. Only in the Vassall Inquiry have there been sessions *in camera.* It follows that the Press are admitted to public sessions and indeed have special accommodation reserved for them.

14. *Shorthand Notes*

It is now usual for a transcript note to be taken of the whole of the proceedings. Copies of this transcript are (subject to security considerations) made available to the legal representatives of persons who have been given the right of representation, against payment of the appropriate charges. The shorthand note of the proceedings is available on the following morning before the Tribunal sits.

15. *The current procedure in Scotland*

A memorandum prepared by the Crown Office and the Scottish Office is attached.

PART III

Criticisms of the Present Procedure and Comments

1. *Criticism*

An interested person is unaware of the precise nature of charges or allegations made against him, and is not therefore in a position to meet any case made against him in the early stages of the inquiry, and may not (if the individual is an early witness) even know to what extent he is at risk when being examined and cross-examined by counsel to the Tribunal.

Comment

(*a*) This problem would probably not be acute if (1) there was more time to assemble and consider the evidence before starting the inquiry, and (2) if there were rules of procedure providing for interested persons to be made parties to the inquiry and entitled to receive in advance copies of such documents as the Tribunal considered necessary and authorised them to have (see Part I paragraph 5).

(*b*) In the Vassall Inquiry, interested persons who had already given evidence were recalled as witnesses to answer charges arising out of subsequent oral evidence or documents coming to hand during the course of the inquiry. The persons concerned were given advance notice of the charges. This procedure

was an improvement on the defects in the procedure adopted in earlier Tribunals, but cannot be said to be entirely satisfactory, and indeed it extended the duration of the hearings of the Tribunal substantially owing to the necessity to recall witnesses not only to answer charges but to rebut the further evidence of witnesses who had been recalled.

2. *Criticism*

An interested person should be entitled to receive in advance copies of statements made to the Treasury Solicitor for the Tribunal.

Comment

To some extent interested persons are already supplied in advance with copies of statements which are to be made by other persons who are going to give evidence before a Tribunal. There are, however, difficulties about this in practice.

(*a*) Owing to the political pressure on the Tribunal to start its hearings at the earliest possible moment, it is extremely difficult if not impossible to give interested persons who are going to give evidence before the Tribunal, in advance, copies of statements and documents, since the statements may not be in existence and documents may not be available when the interested person gives evidence. Statements relating to events that occurred many years ago require careful checking. Furthermore, statements may require amendment or expanding as the hearings progress. As indicated in the comment to the previous paragraph 1 of this part of the memorandum, witnesses can be recalled, but this is not entirely satisfactory.

(*b*) Some witnesses are only prepared to make statements on the basis that their evidence is confidential to the Tribunal. Admittedly evidence on such terms need not be accepted, but it is a heavy responsibility for the Tribunal to reject for this reason sources of what may well be valuable factual information.

(*c*) Some witnesses wish to be assured before giving statements with regard to their position if proceedings are brought against them for defamation. In such cases, and indeed in all cases when taking a statement, it has been the practice of the Treasury Solicitor to inform the witness that his statement is required for the use of the Tribunal only. This must assist a witness to plead qualified privilege in defence, even if the defence of absolute privilege cannot be relied on. It is sometimes the case that statements contain what the Tribunal considers to be irrelevant material or material which may tend to incriminate the maker of the statement and into which the Tribunal feel there may be no need for counsel to probe further. Witnesses are undoubtedly more likely to give evidence frankly and fully if they are assured that their statement will not be disclosed to any other person without the consent and authority of the Tribunal.

(*d*) Witnesses who are not interested persons are not entitled to copies of statements. It is not always easy in the early stages to know who will be an interested person.

To some extent the fact that there is a current transcript of each day's proceedings, available on the following day, is a protection to interested persons. If a witness does not come up to proof on his statement or any of them, it has been the practice for counsel for the Tribunal to give copies of his statement to the other interested persons.

3. *Criticism*

An interested person should be entitled to cross-examine other people who give evidence before the Tribunal.

Comment

This is a matter which it is within the discretion of the Tribunal to allow, since the Tribunal regulates its own procedure. Admittedly there is no rule of procedure that gives this right. Permission has, however, been liberally given, in practice. Whether or not any procedure determined by a Tribunal for its hearings could be challenged as being contrary to natural justice seems open to doubt.

4. *Criticism*

An interested person should have the right to produce his own witnesses.

Comment

Under Section 1(1) of the 1921 Act, only the Tribunal itself has the power to summon persons to give evidence. This seems inherent in the inquisitorial procedure of such Tribunals. Experience has shown that Tribunals have always leaned in favour of hearing witnesses whose names have been suggested by interested persons, but as already described in paragraph 7(5) of Part II, the witnesses remain the Tribunal's witnesses, which thus retains control of the proceedings.

5. *Criticism*

Interested persons should have an early right of reply.

Comment

This is very difficult in practice, though the Tribunal could provide for it in their procedure. It is presumably suggested that counsel for interested persons should have the right to make an opening speech following that of the Attorney-General or other counsel appearing for the Tribunal. At this early stage, (although it may be desirable to confer a right to open) it would be seldom possible for counsel representing interested parties to make an adequate reply to the opening speech of counsel for the Tribunal. An inadequate reply based on incomplete or inaccurate instructions, might do the interested person more harm than good.

6. *Criticism*

An interested person should be given time to prepare his answer.

Comment

This point has already been covered in paragraph 7(6) of Part II, and the steps have been described which have been taken to protect the persons concerned. There does not appear to be any evidence of injustice having been caused as a result of this.

7. *Criticism*

Interested persons should have a right of legal representation.

Comment

If an unrestricted right of legal representation is given, it is difficult to know where to draw the line. It would seem better, therefore, to leave the matter in the discretion of the Tribunal, who are kept fully briefed with regard to the progress of the investigations by the Treasury Solicitor, and have copies of all documents and statements. They seem best placed, therefore, to make a decision. Unlimited legal representation can lengthen the duration of the Tribunal's proceedings to an inordinate degree, and can place a heavy financial burden on witnesses, which may not be repaid from public funds. A multiplicity of legal representation, furthermore, adds to the difficulty the Tribunal may have in controlling the hearings and preventing irrelevant issues being explored.

8. *Criticism*

The fact that the hearings of a Tribunal are usually in public is objectionable.

Comment

As the matters being inquired into have been described in the resolution setting up the Tribunal as being of urgent public importance it is clearly difficult for the Tribunal, except on security grounds, to sit *in camera*. The Tribunal in practice must, with this exception, sit in public and its sessions must be open to the Press. The wording of Section 2(*a*) of the 1921 Act does

not seem to be wide enough to permit the Tribunal to exclude the public on the grounds that evidence may damage private individuals if such evidence is given in public and possibly given wide publicity by the Press. It is interesting to compare the provisions of Section 2(*a*) of the 1921 Act with Order 44, Rule 2(4) of the Rules of the Supreme Court in England and Regn. 9(11) of the Civil Aviation (Investigation of Accidents) Regulations 1951. The latter provides that the court (i.e. the Commission holding the inquiry) shall hold the inquiry in open court save to the extent to which the court is of opinion that in the interests of justice or in the public interest any part of the evidence or any argument relating thereto should be heard *in camera.* Here the interests of justice as well as the public interest are criteria relevant to the decision of the Tribunal on whether or not to sit in public.

9. *Criticism*

A Tribunal should not have power to certify persons for contempt.

Comment

At present the Tribunal has no power to commit for contempt. It has power, by the chairman's certificate, to report an offence to the High Court which under Section 1(2) of the 1921 Act may inquire into the alleged offence, and after hearing witnesses and any statement offered by the respondent, may punish him in like manner as if he had been guilty of contempt of the court. In view of the wording of the Act (which presumably envisaged the possibility of there being a chairman without legal qualifications), it is difficult to simplify the procedure to be followed (see paragraph 7(7) of Part II).

Clearly there must be some sanction to enforce the Tribunal's decision to require a witness in attendance before it, to answer a question relevant to the proceedings. If the Tribunal is to have no power to certify for contempt to the High Court, the only alternative seems to be that it should report back to Parliament. If a refusal to answer questions had to be referred back to Parliament, the result might perhaps result in a division on party political lines which could be very damaging to the authority of the Tribunal.

If the 1921 Act were amended so that membership of a Tribunal should be confined to judges of the High Court or above, it might be possible to give the Tribunal itself power to attach for contempt. It seems doubtful, however, whether this would be right in principle, since a Tribunal under the 1921 Act, although possessing the powers of the High Court is not part of the High Court, nor is it a Court of Record.

The procedure provided by Section 1(2) of the 1921 Act is comparable with procedures provided in other legislation where witnesses are in contempt of a Tribunal. Examples of analogous procedures are to be found in Section 101 of the Army Act 1955 (civilian witness at Court Martial) and paragraph 7 of the 5th Schedule to the Pipe-Lines Act 1962 (witnesses to public inquiries).

10. *Criticism*

The lack of specified rules of procedure is unfair to interested persons at hearings.

Comment

This has already been referred to in paragraph 5 of Part I and paragraph 11 of Part II of this memorandum. It has been objected that interested persons, because of the absence of rules of procedure, lack the benefit of the normal presumptions of innocence before a court of law and are not protected by any rules of evidence or procedure. This, however, seems to be an inherent feature of the inquisitorial procedure. There can be no presumption of innocence in such cases, because there is no prosecutor upon whom the onus of proving guilt can be placed. It would seem to be almost impossible to devise a complete code which would not interfere with the flexible nature of the present system, which is absolutely essential if the Tribunal is to have a real chance of ascertaining the facts and arriving at fair conclusions on those facts.

Many Tribunals have some general rules of procedure laid down by Regulations. For example, a court of inquiry convened to conduct a formal investigation into a shipping casualty has certain basic regulations relating to proceedings in Court, which are to be found in Rule 10 of the Shipping Casualties and Appeals and Re-hearings Rules of 1923. A public inquiry to investigate an aircraft accident as provided for by the Civil Aviation (Investigation of Accidents) Regulations, 1951, has rather similar rules of procedure under Regn. 9 of the Regulations.

11. *Criticism*

An innocent person may become involved in heavy expenditure in being legally represented before a Tribunal. The costs of all persons so represented should be met out of public funds.

Comment

Although Section 2(*b*) of the 1921 Act authorises the Tribunal to allow legal representation of interested persons, no provision is made for the payment of the legal costs incurred either out of public funds or by any party whose conduct in making, for example, false allegations or accusations has necessitated the inquiry. Legal aid is not available for representation before Tribunals.

As already mentioned in paragraph 10 of Part II, the Home Secretary requested the Vassall Tribunal to advise him in which cases justice required that an *ex gratia* contribution to the interested person's costs should be made from public funds, and what proportion of the reasonable costs incurred the contribution should, in the Tribunal's view, represent in each case. It will be noted that the Home Secretary used the words " reasonable costs ". This perhaps ought to be defined by reference to one of the recognised costs scales used by the High Court, i.e. in the case of the High Court, party and party, common fund or solicitor and client. The latter, however, amounts to a complete indemnity. A common fund scale or basis would seem to be reasonable and was generally applied to bills of costs covered by recommendations of the Vassall Tribunal. Under Section 32(5) of the Police Act, 1964 which deals with costs of persons incurred in connection with police inquiries, it may be directed by the Secretary of State that these costs should be paid out of police funds. Such costs, have been calculated on a Common Fund basis.

12. *Criticism*

There should be a right of appeal without leave to the Court of Appeal on a point of law against an adverse finding.

Comment

It would be most unusual if the findings of a Tribunal depended on a point of law, but such a possibility might arise if the Tribunal was bound by strict rules of evidence. It might then be said that a Tribunal's findings were based on evidence that had been wrongly admitted. Apart from questions arising out of the admissibility of evidence, it is difficult to see what points of law could be advanced to a Court of Appeal. Assuming that the Tribunal is judicial in character, it might be possible in England to apply by way of prerogative writ to the Divisional Court if the rules of natural justice were not observed.

13. *Criticism*

People who are shown by the evidence given before a Tribunal to have made themselves liable to a criminal charge cannot easily be prosecuted because they have already been publicly tried.

Comment

This is often an inevitable result of any method of public inquiry and in the case of Tribunals under the 1921 Act, this has always been accepted, although it has not always prevented criticisms of decisions not to prosecute in such cases.

The difficulty can to some extent be overcome by the fact that it is always open to the Tribunal not to investigate any matter which it considers more

suitable for police action. The Lynskey Tribunal adopted this course and an official of the Board of Trade was prosecuted under the Prevention of Corruption Act, 1906.

An interested person may refuse to give evidence, which the Tribunal wishes to hear, for fear of incriminating himself. If the offence which the person has committed is one against the Official Secrets Act, this difficulty could in a suitable case be overcome by the Attorney-General agreeing in advance that he would not give his consent under Section 8 of the Official Secrets Act, 1911 to any prosecution for the offence. This would not, however, overcome the difficulty in the case of other offences. It seems to be an inevitable consequence of the inquisitorial type of inquiry envisaged by the 1921 Act. The problem is not so acute in Scotland, since all prosecutions of a serious nature are controlled by the Lord Advocate. In the Waters case, the Lord Advocate authorised a statement that criminal proceedings would not be instituted against the witness in respect of his conduct in relation to the matters under investigation.

14. *Criticism*

There should be a preliminary investigation to establish whether or not there is a *prima facie* case for a public inquiry under the 1921 Act.

Comment

This criticism arises to some extent from the feeling that wholly innocent and respectable people may be dragged into the inquiry and suspicions aroused against them which may not be easily or quickly dispelled. Further, it has been argued that the massive procedure of a 1921 Act inquiry is too easily set in motion by irresponsible allegations made under the cover of Parliamentary privilege.

In the Lynskey and Bank Rate cases preliminary investigations were made by the Lord Chancellor of the day. In the Vassall case, the Prime Minister set up a committee of three senior civil servants to investigate the allegations, but this was eventually superseded by a 1921 Act inquiry. Neither the Lord Chancellor nor the civil servants had power to require witnesses to attend or to compel the production of documents. It seems probable, however, that any preliminary investigations would not satisfy public opinion unless it was conducted by the Tribunal itself or by some other impartial judicial person armed with power to take evidence on oath and to compel the production of witnesses and documents.

15. *Criticism*

The 1921 Act does not allow for differentiation between the major cases of national importance and the less important cases of local importance.

Comment

When the list of investigations by 1921 Act Tribunals is considered it is at least doubtful whether the procedure of a public inquiry under the 1921 Act, involving the intervention of Parliament, motions by both Houses and so on, was in the public interest necessary in some of the cases. In the Waters case it was said that very massive machinery had been set in motion to crack a small nut. For minor cases of local importance only, it might be possible to devise a simpler procedure, and indeed inquiries into any matter connected with the police of any area in England and Wales would now be held under Section 32 of the Police Act, 1964 and in Scotland under Section 30 A of the Police (Scotland) Act 1956 as amended by the Police Act, 1964.

16. *Criticism*

The position of the Attorney-General is difficult, particularly in cases with a political background.

Comment

If the Attorney-General feels that he must represent the public interest at an inquiry, and present the case to the Tribunal, he is bound to be criticised in Parliament for being too lenient, or too severe, in his cross-examination of his political colleagues, if any are involved in the inquiry. It has been objected too

that the presence of the Attorney-General lends weight to the allegations put forward against named individuals and may give the impression that the Crown is making charges against them. (See Part IV paragraph 3 where the subject is further discussed.)

17. *Criticism*

The publicity inevitably attending the Tribunal proceedings should be controlled.

Comment

In paragraph 13 of Part II reference has already been made to the statutory requirements for 1921 Act Tribunals to sit in public in the absence of exceptional considerations. It seems clear, moreover, that to satisfy public opinion the proceedings themselves ought in the normal way to be held in public. It seems difficult to exclude the Press from sessions of an inquiry to which the public are admitted. Nevertheless, the publicity attendant on an inquiry is highly unpleasant for innocent persons and may on occasion be damaging to reputations.

18. *Criticism*

The investigation on behalf of the Tribunal and the taking of statements of witnesses, etc., should be entrusted to some other body than the Treasury Solicitor, whose relationship with the Government is very close.

Comment

Clearly the Tribunal cannot carry out the investigation itself whether it is of an inquisitorial or of a purely judicial character. It must have an organization which it can direct with regard to the investigation and which can brief counsel, arrange for witnesses attending and so on. The 1921 Act Tribunal, however, is not a criminal court, and indeed its main function is to investigate and ascertain facts which may or may not lead to further action including criminal proceedings. So far as the Treasury Solicitor is concerned, it has been previously suggested that time and labour could be saved if the assistance of the Metropolitan police could be enlisted for the purpose of taking statements. There are, however, serious objections to this. Firstly, the appearance of the police in an investigation suggests that criminal offences may have been committed and prosecutions are contemplated. Some witnesses are therefore reluctant to give evidence. Secondly, criminal proceedings may subsequently be instituted and the police may be required to assist in the prosecution in the usual way. It would be embarrassing for them if they had been concerned with the Tribunal's investigation. Thirdly, the police are not organized to conduct a detailed investigation involving the procedure of Government Departments. The Metropolitan police gave assistance of a limited character to the Treasury Solicitor in the Vassall Inquiry and in the Lynskey Inquiry. A police investigation, however, is not all that is required. Counsel have to be briefed, the Tribunal have to be kept fully informed and consulted on the progress of the investigation, and there are many matters to be discussed with the legal representatives of interested parties. These matters would not normally be a matter for the police. Experience has taught the Treasury Solicitor, when instructed in a 1921 Act inquiry, that it is necessary to nominate a team of officers within the Department with full supporting clerical, copying and typing staff, which it is necessary to set in motion immediately. The investigation has usually to be split up and the senior officer co-ordinates the whole and ensures that the Tribunal and counsel are kept up to date with the progress of matters. In the Vassall Inquiry, it was necessary to have sections of the team of officers investigating separately (*a*) the events in Moscow and Foreign Office procedure, (*b*) events and procedures in the Admiralty, (*c*) the Press reports and the reporters, (*d*) Vassall's early life, and (*e*) the events in the U.K. leading up to the prosecution and the actual trial.

The preparation of the necessary material within a fortnight or three weeks is a gigantic task, and it can only be undertaken by an organization which has not only the numbers available, but the experienced staff as well.

PART IV

Conclusions

1. *The nature of the Tribunal*

If the Tribunal is to be of an inquisitorial nature, it is difficult to see how it can carry out the duties prescribed by its terms of reference, unless it follows a procedure (with possibly minor modifications) comparable to that explained in Part II of this memorandum. Although the inquiry may not be a judicial inquiry, but inquisitorial in character, it must nevertheless conduct itself fairly. There is, however, no *lis inter partes* and the duty of the Tribunal is to inquire into the facts and report to the Minister who presents the report to both Houses of Parliament. A judicial inquiry, like a Wreck Commissioner with a technical assessor holding a formal investigation into a marine casualty, or a Commissioner appointed, also with technical assessors, to inquire into an aircraft disaster, does not seem to fit in with the purpose and procedure of the 1921 Act which envisages a Tribunal appointed pursuant to a resolution of both Houses of Parliament to inquire into a definite matter of urgent public importance, and it is to the Houses of Parliament, through the Secretary of State, that the Tribunal reports with its findings and the information it has ascertained. A judicial inquiry, sitting much in the same way as the court, hearing the case and evidence presented to it either by counsel appointed by the Tribunal or the Attorney-General, and also by counsel instructed by the persons interested, is not truly inquisitorial. It may be thought that such matters as gave rise to the setting up of the Lynskey Inquiry, the Bank Rate Inquiry and the Vassall Inquiry, should be the subject of inquiry by a Tribunal comprised of legally trained persons, but amending or other legislation would be necessary to make such a constitution compulsory. If the inquiry was a judicial inquiry, the case would be prepared and presented to it without consultation with and advice or directions from the Tribunal itself. Indeed, it might be thought wrong to communicate with the Tribunal behind the backs of the parties. This, it seems clear, is not what is intended by the 1921 Act. A Tribunal to which the 1921 Act applies is not, it seems, conducting a judicial inquiry, though it may have in some respects the appearance of a judicial tribunal.

2. *Possible consequences of substituting a judicial Tribunal for one of an inquisitorial character*

(*a*) A judicial Tribunal would not itself be concerned with the detailed investigation prior to the hearings, or with giving directions to the Treasury Solicitor with regard to it. It would not normally see before the hearings statements of witnesses or other documents which were not at the same time made available to the interested parties. In other words, it would approach the inquiry in the same way as a judge approaches the trial of an action. The responsibility, therefore, for preparing and presenting the case to the Tribunal, of deciding what lines of investigation should be pursued, what witnesses interviewed, and what documents and other evidence should be submitted to the Tribunal, would rest with the Attorney-General, or some other authority designated by legislation. Counsel and the Treasury Solicitor instructing him would not be acting on behalf of the Tribunal and therefore receiving its direct instructions. It is not always realized that the task of preparing and presenting the case to the Tribunal places a heavy onus of responsibility on those concerned. A Tribunal is only appointed when political passions are running high and public suspicions of the conduct of individuals have been aroused. Decisions with regard to whether or not particular lines of investigation should be pursued, what witnesses should or should not be called, and what documents and evidence should or should not be regarded as relevant to the terms of reference of the Tribunal, can require a most exacting judgment. The assistance of the Tribunal by way of positive direction and by way of consultation is of the greatest assistance to those responsible for preparing the case, but this assistance would not, it seems, be consistent with an inquiry conducted by a judicial tribunal.

(*b*) There would, however, be certain advantages in having a judicial tribunal. For example:—

(1) There would not be the same degree of urgency since a judicial Tribunal would not presumably be willing to sit until it was assured that all matters falling within the scope of its terms of reference had been investigated so far as practicable and the Attorney-General or other authority was ready to present the case to the inquiry.

(2) It would be practicable to provide rules of procedure to be applied by the Tribunal to its proceedings, such rules to cover such matters as the procedure at the hearings, the right for persons to be made parties to the inquiry with consequential rights of legal representation and of adducing evidence and of being supplied with documents.

(3) a judicial Tribunal could be given authority to make awards of costs out of public funds or against individual persons on scales recognised by the courts.

(4) Words spoken and statements made in the course of a judicial inquiry would certainly be subject to absolute privilege.

(c) However, these advantages must be balanced against the following considerations:—

(1) The fact that the matter or matters necessitating the Tribunal's appointment are regarded as matters of urgent public importance, makes it obligatory on the Tribunal to take really rapid action. A judicial Tribunal would not ensure this.

(2) Under the 1921 Act, the Tribunal is working, so to speak, to the Houses of Parliament. It is assembling information and ascertaining facts for the Houses of Parliament. Its position is not dissimilar to that of an administrative tribunal appointed by a Minister to hold a public inquiry into objections, the purpose of which is to inform the mind of the Minister. (See Franklin v. Ministry of Town and Country Planning [1947] 2 A.E.L.R. 295, followed in Wednesbury Corporation v. Ministry of Housing and Local Government [1965] 1 A.E.L.R. 186.) If the Tribunal is judicial, the principles of natural justice apply, but they may inhibit the flexibility of the Tribunal and its investigation and introduce considerations which may hamper the investigation. For example, the necessity to base any recommendation or finding on evidence of probative value may add to the difficulty of compiling an objective report. Many principles of natural justice are applied by a 1921 Act Tribunal, e.g. no personal bias by members of the Tribunal, and particulars of charges or accusations are given to interested parties with an adequate opportunity of meeting them, but other procedures, such as the admission of hearsay evidence, might not be acceptable to a court, and therefore to a judicial Tribunal.

(3) The authority presenting the case may prepare and present the case with the wrong emphasis, excluding lines of investigation and the evidence which the Tribunal may consider vital, not only because of its own value, but on account of the opportunity it gives of cross checking other evidence submitted to it. Admittedly a judicial Tribunal can of its own motion adjourn the proceedings for further investigations to be made, but this is far from being a satisfactory procedure. If the Tribunal controls the investigation, it can ensure that all relevant inquiries are, so far as may be practical, made.

(4) A judicial Tribunal may not be in a position to control what witnesses are called by the various interested parties. The witnesses are not the Tribunal's witnesses in the case of an inquiry by a judicial Tribunal.

An inquisitorial inquiry seems perhaps more likely to meet the requirements of the Houses of Parliament in a situation of public disquiet about matters of urgent public interest accompanied by a strong and persistent demand that such matters should be fully probed. A public inquiry of this nature is necessary on occasion for the purpose of maintaining a high standard of public administration, and also for killing harmful and unjustified rumours.

3. *Participation of Law Officers*

The Attorney-General or Solicitor-General may be involved in a 1921 Act inquiry in two ways:—

(*a*) By nominating counsel to appear on behalf of the Tribunal or

(*b*) By leading the team of counsel instructed and briefed by the Treasury Solicitor to appear on behalf of the Tribunal to present the case and to examine and cross-examine witnesses on behalf of the Tribunal.

It has been accepted in recent years that a 1921 Act Tribunal ought itself to take complete responsibility for the whole process of investigation, both before and at the hearing. Counsel are therefore appointed to appear for the Tribunal and all the witnesses are the Tribunal's witnesses. In the case of the Lynskey, Bank Rate and Vassall Tribunals, there was a very considerable political background. In those circumstances it was argued the Attorney-General should not take part, because of his relationship as a Minister of the Government of the day, who might be implicated in the inquiry. It is inevitable that the Attorney-General will be said to have been too lenient or too severe in the cross-examination of witnesses. This criticism, however, has always been resisted by the Attorney-General, who has long been regarded as having a duty as guardian of the law and of the proper conduct of public affairs.

The proposition that the Attorney-General, because he represents "the public interest" in various kinds of legal proceedings, e.g. public charities, is the right person to appear for the Tribunal in 1921 Act inquiries, is at least arguable. Indeed, if the Attorney-General sets up his own authority as in some way complementary to that of the Tribunal (cf. aircraft crash inquiry procedure), an embarrassing dual responsibility can result. It appears to the Treasury Solicitor that a leading counsel of high skill, integrity and reputation could properly discharge the duty of representing the Tribunal with such supporting senior and junior counsel, as he might need. The Treasury Solicitor would instruct and brief him and provide the necessary liaison with the Government Departments concerned. The whole conduct of the proceedings would beyond all argument rest with the Tribunal and criticisms on this ground of political bias would be ruled out.

4. *Treasury Solicitor's participation*

The Tribunal, whether it is inquisitorial or of a judicial character, must, unless the terms of reference are of a simple or minor importance, have the assistance of a team of investigators to prepare the case for submission to the Tribunal, to summon and arrange for the attendance of witnesses, to instruct and brief counsel appearing on behalf of the Tribunal and to conduct correspondence with solicitors and others representing interested parties. The Treasury Solicitor in England, though a Government Department, has on his staff civil servants who are also professionally qualified as barristers or solicitors. Civil servants and professional lawyers are accustomed to approach problems dispassionately. The Treasury Solicitor understands the detailed working of the Government machine, is in constant daily contact with both sides of the legal profession on a variety of matters and has the numbers and organisation which can handle (albeit with difficulty) a 1921 Act inquiry. It is very doubtful whether there is any other legal organisation with knowledge of the Government machine, which could do so. The creation of an *ad hoc* organisation, recruited from outside the Civil Service, seems unpractical. In a recent case in Scotland (i.e. in the Waters case), a firm of solicitors were appointed to conduct the inquiry and instruct counsel on behalf of the Tribunal. This can be made to work providing the issues are clear and the evidence uncomplicated.

5. *Preliminary investigations*

No practical benefit is likely to be gained by an investigation of the facts comparable to that undertaken by a magistrate in committal proceedings. The public will only be satisfied by an investigation by the Tribunal set up pursuant to the Resolution of the House of Commons.

6. *Standard of proof*

There has sometimes been discussion as to the standard of proof which a Tribunal should adopt before reporting its findings and recommendations. A 1921 Act inquiry, however, is not a criminal procedure, and there is no *lis* before the Tribunal or between any of the parties. The Tribunal in its report usually indicates the extent to which it has accepted the evidence submitted to it.

7. *Publicity*

The publicity afforded by public hearings reported with banner headlines by the Press can cause much distress as well as harm to innocent individuals who are concerned with trying to clear their names and reputations. The fear of publicity may also deter witnesses from coming forward and some witnesses might be franker if their evidence was given in private. These, however, are not matters which concern 1921 Act Tribunals alone. The comments in paragraph 8 of Part III are relevant.

8. *Suggested Procedural Improvements*

If no substitute for the 1921 Act is contemplated, then the following suggestions are made to improve the procedure.

(a) *Parties*

A procedure whereby individuals who appeared to the Tribunal (or the Attorney-General or other authority presenting the case) to be concerned or interested in the terms of reference, were made parties to the inquiry, would be helpful. Precedents are to be found in the case of marine investigations and air crash inquiries. Any person made a party to the inquiry would be entitled to the right to legal representation and would be served with copies of the relevant documents affecting him. He would have the right to call evidence. He would be examined in chief and re-examined by his counsel when giving evidence. His counsel would have the right to cross-examine other witnesses. The provisions in Section 2(*b*) of the 1921 Act would require amendment.

(b) *Rules of Procedure*

There seems to be a strong case for providing certain basic rules of procedure, without prejudice to the Tribunal's inherent right and discretion (whether inquisitorial or judicial) to determine its own procedure to meet the particular circumstances of its inquiry. There could be provision for a preliminary hearing at which such matters as applications to be made a party to the inquiry, or to be granted the right to legal representation, could be considered, as well as applications for admission and inspection of documents, and venue. There are other matters which could also be covered by regulations, such as the notice to be given to individuals of allegations or accusations made or to be made against them; the basis of any recommendation by the Tribunal for the payment of the costs of parties out of public funds or by individuals; witnesses' expenses; and the procedure for committing witnesses for contempt and attempts to suborn and intimidate witnesses. It would also be possible to define more precisely the role of the respective counsel appearing at the inquiry, their rights to make opening and closing speeches, and with regard to the examination of witnesses.

(c) *Costs*

It seems reasonable that the Tribunal should be authorised to make recommendations to the Secretary of State with regard to the payment of the whole or any part of the legal costs incurred by any individual who has been made a party to the inquiry. At the moment under the most recent practice the award of costs is discretionary, and the Tribunal has the right to make recommendations. In the case of the Vassall Tribunal it did make recommendations which resulted in some costs being reimbursed in full, some in part, and some not at all. A discretionary system allows the Tribunal to take into consideration any behaviour of witnesses which may, for example, have been either frivolous or irresponsible, and so not justify any awards of costs. The Tribunal saw fit to adopt this procedure in the Vassall Inquiry. The possibility of irresponsible behaviour may well be more probable in the case of proceedings where there is a political back-

ground. and where the issues are the subject of great public interest, and so command considerable space in the daily papers. In these circumstances it seems reasonable to retain the protection for the taxpayer which is represented by the discretion not to recommend the reimbursement of costs or the whole of them in undeserving cases. The award of costs should be linked to a scale applied by the High Court or Court of Session. The expression " reasonable costs " should be avoided and a more precise definition adopted.

(d) *Time*

It is clearly desirable that more time should, in the interests of justice to the parties concerned, be allowed for preparing the case. In the Lynskey, Bank Rate and Vassall Inquiries the Tribunals had commenced their sittings when the matters were only half investigated.

MEMORANDUM OF EVIDENCE SUBMITTED BY THE HON. MR. JUSTICE SCARMAN, O.B.E.

Introduction

1. It is proposed to present in this memorandum a short comparative survey indicating the way in which certain questions which have arisen under the Tribunals of Inquiry (Evidence) Act, 1921, have been dealt with in three Commonwealth countries possessing comparable procedures. The countries selected are Canada, India and Australia. For the sake only of convenience I shall consider the provisions of these countries in that order under a number of specific headings.

The Canadian study is based on information supplied by the Honourable James C. McRuer, LL.D., Chairman of the Ontario Law Reform Commission ; the Indian study on the Twenty-fourth Report of the Law Commission of India, the subject of which was the Commissions of Inquiry Act, 1952 ; and the Australian, on information supplied by the Honourable James K. Manning, Chairman of the New South Wales Law Reform Commission.

2. The Canada study is illustrated in part by decisions of the Courts of Ontario, as it was to these decisions that Mr. McRuer drew my attention. No doubt further illustrations could be found in Federal case law, and indeed in the case law of other Provinces, but in the time available I have not been able to carry out such an extensive survey. Nevertheless, I believe and hope that the material collected, although of limited scope, may afford a useful basis of comparison between the English and Canadian systems.

Mr. Justice Manning, of the New South Wales Law Reform Commission, had founded some part of his comments on the law of that State, but the Australian study also draws on the Commonwealth statute and other State statutes of similar effect.

3. The scheme adopted has been to ascertain the law and practice, so far as has been possible, in Canada, India and Australia respectively, in relation to the points set out in paragraph 4 below, all of which are relevant to the English system as it exists at present, and have been the subject of comment or criticism at various times since the passing of the 1921 Act.

The memorandum concludes with an expression of some personal views on certain aspects of the English system.

Points investigated

4. *General procedure*

(*a*) Is the lack of specific rules of procedure unfair to interested persons? (" Interested person " in this context means a person appearing before a Tribunal who has a direct interest in the outcome of the inquiry.)

(*b*) Would it be better for the Attorney-General to nominate counsel to assist the Tribunal, rather than to appear himself? Or should the Tribunal appoint its own counsel?

(*c*) Is it objectionable that hearings of a Tribunal should usually be held in public?

Protection given to interested persons (bearing the meaning indicated in (*a*) above)

(*d*) It is said in relation to Tribunals constituted in the United Kingdom under the 1921 Act that interested persons may not know that they are at risk; and in any event are not in a position to meet effectively any case against them that emerges during the hearing. A number of detailed questions call for consideration: for example,

(i) Should such persons be entitled to receive in advance copies of proofs or other statements known to have been made by those whom it is intended to call?

(ii) Should they have a right of legal representation? (Under Section 2(*b*) of the Act of 1921 they have not this right now).

(iii) Subject to security considerations, should they be entitled to cross-examine other people who give evidence before the Tribunal?

(iv) Should they have the right to produce their own witnesses? (Under Section 1(1) of the Act of 1921 only the Tribunal itself can summon persons to give evidence.)

(v) Should they have an early right of reply to any criticism which has been made publicly?

(vi) Should they be given time to consider their evidence and prepare their answers in the light of other evidence?

(*e*) If a person incriminates himself by his own evidence in the course of the Tribunal's proceedings, should that evidence be inadmissible against him in subsequent criminal or civil proceedings?

(*f*) Should a Tribunal have power to certify persons for contempt? If not, how is the Tribunal to deal with a person who refuses to answer questions?

(*g*) If a person is found to be innocent, the Tribunal should make this absolutely clear in their report. (In fact, Tribunals set up in the United Kingdom under the 1921 Act have always been alive to the necessity of doing this.)

Costs

(*h*) Should legal aid be available for interested persons appearing before a Tribunal, and, if an interested person is financially not eligible for legal aid, in what (if any) circumstances should his costs be met out of public funds?

General remarks

Canada

5. The relevant Canadian (i.e. Federal) Statute is the Inquiries Act, Revised Statutes of Canada 1952, Ch. 154.

Ontario has its own Statute of similar effect, the Public Inquiries Act, Revised Statutes of Ontario 1960, Ch. 323.

There is no provision in the Federal Statute of similar effect to Section 5 of the Ontario statute, and indeed according to the observations of Shroeder, J.A., *in re* The Ontario Crime Commission, *ex parte* Feeley and McDermot[1], this provision is unique. Section 5 provides that:

"5.—(1) Where the validity of the commission or the jurisdiction of a commissioner or the validity of any decision, order, direction or other act of a commissioner is called into question by any person affected, the commissioner, upon the request of such person, shall state a case in writing to the Court of Appeal setting forth the material facts and the decision of the court thereon is final and binding.

(1) (1962) Ontario Reports 872,889

(2) If the commissioner refuses to state a case, any person affected may apply to the Court of Appeal for an order directing the commissioner to state a case.

(3) Pending the decision of the stated case, no further proceedings shall be taken by the commissioner.

(4) No action shall be brought or other proceedings taken with respect to anything done or sought to be done by the commissioner or to restrain or interfere with or otherwise direct or affect the conduct of any such commissioner."

The information given by Mr. McRuer is intended to apply to cases where the commission is set up under the Inquiries Act or its Provincial equivalent, but not to statutory inquiries set up under specific Acts, even though the powers of a commissioner under the Inquiries Act may be conferred on the persons appointed to hold such inquiries. In the case of such statutory inquiries, different considerations may arise which are not examined in this study.

India

The Twenty-fourth Report of the Law Commission of India has not yet been implemented ; it was laid on the Table of the Houses of Parliament on August 30th, 1963, and its recommendations are being examined by the Ministry of Home Affairs.

The relevant statute is the Commissions of Inquiry Act, 1952.

Australia

The relevant Commonwealth statute is the Royal Commissions Act, 1902-1933.

New South Wales has its own Royal Commissions Acts, 1923-1934, and various other States have their own statutes of equivalent effect, some of which are referred to below.

The Commonwealth Act applies to commissions set up pursuant to a Royal Commission issued by the Commonwealth, and the appropriate State Act to Commissions set up pursuant to a Royal Commission issued by a State. The Commonwealth and State statutes operate in general in different fields, but should exceptional circumstances give rise to conflict, such as, for example, a conflict between the functioning of a Royal Commission appointed under Commonwealth law and a Royal Commission appointed under a State law, the position would be governed by Section 109 of the Commonwealth Constitution. Section 109 provides that where a law of a State is inconsistent with a law of the Commonwealth the latter shall prevail, and the former shall be invalid, to the extent of the inconsistency.

Specific points (see paragraph 4 above)

6. Point (*a*). Is the lack of specific rules of procedure unfair to interested persons?

Canada

There are no specific rules of procedure enacted in either the Canadian or the Ontario statute referred to above, and neither of them contains any general rule-making power under which they could be made.

The view of Mr. McRuer is that to attempt to lay down specific rules of procedure would be harmful and might, in many cases, result in prejudice to interested persons.

India

In India rule-making powers are contained in the Act, and rules have in fact been made, so that the assumption on which the question rests is not entirely valid. Nevertheless, it appears that each tribunal has a certain discretion in the matter, as is indicated by the statement of Chagla, C.J., quoted at the foot of page 11 of the Report of the Law Commission of India, on the procedure which he proposed to follow in the Mundhra inquiry. This quotation reads as follows:

"I will examine the witnesses who come before the Commission. The Attorney-General will then question them and supplement the evidence in any manner that he thinks proper, counsel who are appearing for other interests will then have the right of examining these witnesses and I will finally put any other question which I may think necessary to the witnesses. It will be open to the counsel appearing for the different interests to call for any evidence they think proper, and after all the evidence is offered, counsel may address me on the evidence."

By virtue of Section 8 of the Act a Commission of Inquiry may itself settle its procedure, subject to such rules as may have been made in that behalf.

Section 12 contains a power enabling the "appropriate government" (which is defined in Section 2) to make rules to carry out the purposes of the Act. Section 12(2)(*b*) provides specifically for rules governing "the manner in which inquiries may be held under this Act and the procedure to be followed by the commission in respect of the proceedings before it."

The Central Commissions of Inquiry (Procedure) Rules, 1960, have been made under Section 12. The Law Commission of India recommended that the provisions of two of these rules (which are considered under Point (*d*)(i) to (iv) paragraphs 9 to 12 below) should be incorporated into the Act itself, but made no further recommendation. It would seem, therefore, that in their view the position does not give rise to hardship.

Australia

In the view of Mr. Justice Manning, it might be thought, considering the matter in the abstract, that there could be some unfairness, but in practice commissioners are generally alert to avoid unfair prejudice to interested persons. There are no specific rules.

It has been the usual practice in Australia, he says, for counsel assisting the commission to confer with the commissioner in chambers as to the general conduct of the commission, and so far as he is aware there has been no criticism of this practice.

7. Point (*b*). Would it be better for the Attorney-General to nominate counsel to assist the Tribunal, rather than to appear himself? Or should the Tribunal appoint its own counsel?

Canada

This question is only partially relevant to Canadian conditions, as Canada has no officer who functions as the Attorney-General functions in England and Wales. It is not the practice in Canada for the Attorney-General to appoint counsel to appear on his behalf before a commission. The commissioner is, however, himself given power under Section 11(1) of the Canadian statute to engage "the services of counsel to aid and assist the commissioners in the inquiry".

India

The Law Commission of India noted that the desirability of the Attorney-General assisting a Tribunal of Inquiry has been called in question in England on the ground of his connection with the Government, and said (at page 12 of their Report): "We express no opinion on this question, but we see no reason why the highest law officer of the Government cannot take an objective view of the matter".

It would seem, therefore, that the political character of the office of the Attorney-General does not present to Indian eyes any hazard, actual or potential, to the impartiality of his conduct of a commission of inquiry. (It is not known how often the Attorney-General appears at such tribunals in India, but the fact that he does so from time to time is evidenced by the quotation from the proceedings of the Mundhra inquiry.)

The proposal of the Law Commission of India that "fact-finding machinery" similar to that operated in England by the Treasury Solicitor should be established in India, is not without interest in this context.

Australia

Mr. Justice Manning says that in New South Wales and, so far as he is aware, in other States it is not the practice for the Attorney-General himself to appear to assist the tribunal; it is the practice of the Crown to instruct counsel to appear to assist the tribunal. He believes it is correct to say that the Commonwealth Government follows the same practice.

Section 6 FA of the Commonwealth Act is not irrelevant, although it deals primarily with rights of cross-examination and similar matters; its opening words are as follows: "Any barrister or solicitor appointed by the Attorney-General to assist a commission, . . . may, so far as the commission thinks proper, examine or cross-examine any witness . . .".

The following quotation[1] may be of interest for the light it throws on the standing and functions of counsel appointed to assist a commission:

> "My learned friends and I would like Your Honours' indulgence to state publicly one matter which we know does not need stating to Your Honours: that is to explain particularly our position as Counsel assisting Your Honours. We do not appear here to attack or to shield or to defend any one: we are appearing only to assist Your Honours to ascertain the truth concerning the matters which are the subject of this inquiry, by assembling and presenting evidence to Your Honours.
>
> We shall suggest to Your Honours what in some matters appears to us to be the proper inference to be drawn from the evidence submitted. However we are not here to urge and press upon Your Honours any conclusion. Where the facts lead and whom the truth may hurt, we feel, is not our concern. We shall, however, endeavour to avoid saying anything which could be used by the malicious to smear any one's reputation without there being any real justification.
>
> We feel that two things follow from our position. First of all, we do not take and will not take any instructions from anybody as to the manner in which we should conduct this inquiry, excepting only, of course, Your Honours. Secondly, since we are not in the position of counsel for a party in litigation, who calls his witnesses and urges that their testimony should be accepted, we shall, when it seems to us necessary to do so, cross-examine witnesses whom we may call. And in fact we may call some people only for the purpose of cross-examining them.
>
> Again, may I with Your Honours' indulgence make what is really a public announcement? There may be some people who, as this inquiry proceeds, will wish to furnish information which they feel would be of assistance to Your Honours in ascertaining the facts. Any such information or any communications relating to it should be directed, we suggest, obviously not to Your Honours, but either to the Secretary of the Commission or to Mr. Mahony, of the Commonwealth Crown Solicitor's Office in Sydney, each of whom will collect any material that is communicated to him and see that it is transmitted to the proper quarters either for information or further investigation.
>
> In an inquiry such as this Your Honours of course are not restricted by any merely technical rules as to the admissibility of evidence, such as apply in litigation between parties. Moreover, Your Honours can accept, and, if Your Honours think fit, base a conclusion upon hearsay evidence. But it will be our endeavour to produce the best evidence possible upon all matters; and we will respectfully suggest that hearsay evidence should, ordinarily speaking, not be relied upon unless it be corroborated or confirmed in some way, as, for example, where it is consistent with material facts which can be otherwise proved."

8. Point (*c*). Is it objectionable that hearings of a Tribunal should usually be heard in public?

Canada

Mr. McRuer's opinion is that the question whether hearings of a tribunal should be held in public should be entirely a matter for the discretion of the

[1] From the opening address of senior counsel assisting the Royal Commission on Espionage, 1954.

commissioner, who could in many cases conduct a more effective inquiry in private, and at the same time justly protect the reputation of the parties involved. Public opinion, he says, inclines towards the inquiries being in public.

India

By Section 8 of the Indian Act the question whether hearings should be held in public or in private is expressly left to the discretion of the Commissioner concerned, subject to any rules made under Section 12. It appears that no rules bearing on this point have been made.

Thus the practice accords with that followed in Canada although, in the latter country, no express statutory provision to the effect of the Indian one exists in either the Federal or the Ontario Statute.

This aspect of Section 8 of the Act is considered in the Report of the Law Commission of India, who found that the matter was essentially one for the exercise of discretion in each case, and accordingly recommended no change.

Australia

Mr. Justice Manning feels that it is not objectionable that hearings are usually held in public, and that on the contrary it would be considered objectionable if hearings were not held in public, except for some special reason such as security considerations.

In the case of the Royal Commission on Espionage, he says, the Commission was authorised to take evidence in private if it thought fit. However, the Chairman of the Commission announced at the opening of the inquiry that the Commissioners considered that they "should adopt the general principle of holding the inquiry . . . in public session." This point of procedure was raised at the outset by counsel assisting the Commission.

It may be noted in this context that section 6D(2) of the Commonwealth Act gives a specific power (later expressed to be without prejudice to any other power) to hear evidence in private if a witness so requests on the ground that his evidence "relates to the profits or financial position of any person" and that the taking of the evidence in public would prejudice that person.

9. Point (*d*)(i). Should interested persons be entitled to receive in advance copies of proofs or other statements known to have been made by those whom it is intended to call?

Canada

Mr. McRuer considers that a statutory provision that interested parties should receive advance copies of statements made to the tribunal's agent would unduly hamper the conduct of the inquiry.

He thinks that in Canada such matters are left to the wisdom of the commissioner, and very little difficulty is experienced.

India

Neither the Act nor the Central Commissions of Inquiry (Procedure) Rules, 1960, which apply to commissions of inquiry appointed by the Central Government, contain any provision entitling interested persons to see in advance statements made by other witnesses, although Rule 2 thereof sets out in some detail the procedure to be followed in relation to the submission of statements to the commission.

The Law Commission of India did not comment unfavourably, or indeed at all, on the absence of such a provision, and it may presumably be inferred that they considered the present position satisfactory.

Australia

Mr. Justice Manning's views are as follows: this would depend in part on the nature of the inquiry, or at any rate on the subject matter of the particular statements. It would probably not be considered desirable in the case of allegations of corrupt conduct or other similar wrong-doing. From inquiries he has made, he understands that it is not the recent general practice in New

South Wales to give advance copies of statements, except perhaps in the case of purely statistical information or similar material. It would seem, however, that there would be no objection in principle to statements being given in advance in many instances. It seems to him that any unfair prejudice could be avoided by allowing cross-examination, and by allowing time for affected persons to prepare the case which they desire to make in reply.

He mentions the proceedings before one Royal Commission, that which inquired into the loss of H.M.A.S. "Voyager" in 1964, in which it appears that statements gathered by the Commonwealth Crown Solicitor, who instructed counsel assisting the Commission, were to be given to certain interested parties.

10. Point (*d*)(ii). Should interested persons have a right of legal representation?

Canada

The relevant statutory provisions are Sections 12 and 13 of the Canadian Act, which read as follows:

> "12. The commissioners may allow any person whose conduct is being investigated under this Act, and shall allow any person against whom any charge is made in the course of such investigation, to be represented by counsel.
>
> 13. No report shall be made against any person until reasonable notice has been given to him of the charge of misconduct alleged against him and he has been allowed full opportunity to be heard in person or by counsel."

Both these sections are interpreted so as to apply to an "inquiry" under Part I of the Act, which is headed "Public Inquiries", and an "investigation" under Part II of the Act, which is headed "Departmental Investigations".

The word "charge" in Section 12 is given a wide interpretation, and the distinction between this word and the phrase "charge of misconduct" appears to be slight, if indeed it exists.

Mr. McRuer does not think that the word "charge" has ever been interpreted in a narrow sense as meaning an allegation of a criminal offence. He thinks that it means an allegation of misconduct, which might include an allegation involving crime or mere dereliction in public duty. For example, he says that a charge that a public officer has shown favouritism to his friends to the detriment of the public welfare would be sufficient to entitle him to counsel as of right under Section 12.

Nevertheless, Mr. McRuer informs me that there has been one case in which the commissioners refused to permit counsel to appear for persons whose conduct was being investigated: the proceedings before the Royal Commission on Espionage appointed under Order in Council P.C. 411 of 5th February, 1946. Apparently there was good reason for their refusal, but nevertheless this course would appear to be contrary to the mandatory "shall" of Section 12.

The conduct of and the procedure adopted by this Commission have been the subject of criticism by at least one academic writer in Canada[1], and he has suggested that Parliament should clarify Sections 12 and 13 in the light of the interpretation placed on these sections, and particularly on Section 13, by the Commissioners. Their interpretation of the latter section, at least so far as concerned David Shugar, one of the persons whose conduct was being investigated, appears from the following extract from page 318 of the Commission's Report:

> "We think this position [the Report earlier stated that Shugar's counsel took the position that he was prepared to answer any charge of misconduct against his client which the Commissioners saw fit to report upon, but did not propose to produce evidence to answer evidence in the absence of such a charge being made] misconceives the provisions of the Inquiries Act. That position assumes that a commission, under the Statute, must reach a conclusion unfavourable to a witness before it, and thereafter hear evidence or argument on behalf of that witness directed to inducing the commission to change its mind. We do not think the Statute so irrational."

(1) M.H. Fyfe: "Some Legal Aspects of the Report of the Royal Commission on Espionage" (1946) 24 Canadian Bar Review 7.

Although at least one reported case(1) throws some light on the true construction of Section 13, and the section has also been discussed in the report of another commission(2), both these proceedings were prior to the Report of the Royal Commission on Espionage, and from the latter Report it may be concluded that a statutory formula which appears to be so drafted as to provide substantial safeguards for interested persons may nevertheless be effectively circumvented.

Mr. McRuer is of the view that the Federal Act would be improved in this respect by the inclusion of an appeal provision such as is contained in Section 5 of the Ontario Act. He recommends, however, that Section 5(3) of the Ontario Act should be amended so as to permit the commissioner to proceed with the inquiry, except in so far as it may be affected by the point raised in the stated case.

In conclusion on this point, Mr. McRuer is of the view that counsel would always be permitted to appear for witnesses to claim the protection of the Canada Evidence Act (referred to further below).

India

The Indian system, unlike that of the United Kingdom, provides a right of legal representation in certain circumstances at least so far as commissions appointed by the Central Government are concerned. Rules 4 and 5 of the Central Commissions of Inquiry (Procedure) Rules, 1960, read as follows :

> " 4. Persons likely to be prejudicially affected to be heard.—
>
> If, at any stage of the inquiry, the Commission,—
>
> (*a*) considers it necessary to inquire into the conduct of any person ; or
>
> (*b*) is of the opinion that the reputation of any person is likely to be prejudicially affected by the inquiry,
>
> the Commission shall give to that person a reasonable opportunity of being heard in the inquiry and to produce evidence in his defence.
>
> 5. Right of cross-examination and representation by legal practitioner.—
>
> The Central Government, every person referred to in rule 4 and with the permission of the Commission, any other person whose evidence is recorded under rule 3—
>
> (*a*) May cross-examine a witness other than a witness produced by it or him ;
>
> (*b*) may address the court ; and
>
> (*c*) may be represented before the Commission by a legal practitioner or, with the consent of the Commission, by any other person."

This is broadly in line, so far as interested persons are concerned, with the position in Canada.

It may be noted that the Commission also has a discretion under Rule 5 to allow representation to other persons.

The Law Commission of India did not recommend any change in the substance of these provisions.

Australia

The New South Wales Statute (the Royal Commissions Act, 1923 to 1934) provides for legal representation for interested persons. It is to be noted however that they are not entitled to representation, as is the case in Canada and India ; it is a matter for the discretion of the Commission.

Section 7(2) of the New South Wales Act provides that

> " (2) Where it is shown to the satisfaction of the chairman, or of the sole commissioner, as the case may be, that any person is substantially and directly interested in any subject-matter of the inquiry, or that his conduct in relation to any such matter has been challenged to his detriment, the chairman or sole commissioner may authorise such person to appear at the inquiry, and may allow him to be represented by counsel or solicitor."

(1) *Re* The Imperial Tobacco Company *et al* and McGregor (1939) Ontario Reports 627 and 639 to 643.

(2) The Royal Commission on the Bren Machine Gun Contract, 1938, pages 30 to 35 of the Report.

11. Point (*d*)(iii). Subject to security considerations, should interested persons be entitled to cross-examine other people who give evidence before the Tribunal?

Canada

No general rule on the right to cross-examine can be usefully laid down in statutory form, in the view of Mr. McRuer. Each case must be governed by its own facts, and he considers that the right to cross-examine should be left to the discretion of the commissioner.

Two cases in which the point arose have recently reached the Court of Appeal of Ontario.

In a decision in 1962[1], it was held that individuals against whom imputations of serious crime had been made were entitled to call evidence and to elicit facts by examination and cross-examination.

In April, 1965, the Court of Appeal of Ontario held in an unreported decision in a case arising out of an investigation into the manipulation of shares in a company (popularly known as the "Windfall" Company), that parties whose conduct was being investigated were not entitled to have their counsel cross-examine witnesses, and that the matter "of the examination of any witness by other than the commission's counsel may only take place where the commissioner accords that privilege".

Mr. McRuer comments that these two cases are difficult to reconcile, and the only conclusion he can come to is that it is a matter of discretion for the commissioner, but a discretion that the Court of Appeal will review on a stated case, if it appears that a real injustice was done. (N.B. The provision for an appeal on a stated case is a peculiarity of the Ontario Statute.)

India

This point is covered by Rule 5(*a*) of the rules, read in conjunction with Rule 4. Cross-examination is expressly allowed to persons within Rule 4. Thus the position in India is more clear-cut than in Canada.

Here again, no change in substance was recommended.

Australia

Section 7(3) of the New South Wales Act provides as follows:

> "(3) Any counsel or solicitor so appointed and any person so authorised or his counsel or solicitor may with the leave of the chairman or of the sole commissioner, as the case may be, examine or cross-examine any witness on any matter which the commissioner deems relevant to the inquiry, and any witness so examined or cross-examined shall have the same protection and be subject to the same liabilities as if examined by the commissioner."

Mr. Justice Manning believes that the Section 7(3) discretion (and also that given by Section 7(2); see paragraph 10 above) is liberally exercised in New South Wales.

Queensland, South Australia, Tasmania and Western Australia all have their own statutes which contain provisions relating to legal representation for interested persons, or rights of examination or cross-examination, or both; however Mr. Justice Manning observes that in all those cases the matter is left to the discretion of the commission and no legal right is conferred. It seems preferable, he says, to leave the matter as one of discretion for the tribunal in order for one thing to enable it to prevent inquiries from getting out of hand.

12. Point (*d*)(iv). Should interested persons have the right to produce their own witnesses?

Canada

This question is considered together with Points (*d*)(v) and (vi) (set out in paragraph 4 above and also at paragraphs 13 and 14 below) in the case of Canada.

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[1] *Re* The Ontario Crime Commission, *ex parte* Feeley and McDermott, cited above.

Mr. McRuer does not consider that any binding rule can usefully be laid down on these points. In Canada, he says, wide latitude has always been given to permit parties against whom findings might be made to appear by counsel and produce evidence, either by calling the witnesses or by giving the names of the witnesses to the commission counsel. Such rights are not usually accorded to parties who wish to intervene. The calling of evidence suggested by such parties is usually left in the hands of the commission counsel.

India

This point is also covered by the Rule, as may be seen from the quotation above.

No change was recommended, but it may conveniently be noted at this point in reference to Rules 4 and 5 that the Law Commission of India were of the view that these two Rules are of such importance, embodying the fundamental principles of natural justice and safeguarding the rights of individuals, that they should be incorporated into the Act.

Australia

Section 8 of the New South Wales Act authorises the Commission to summon witnesses. If an interested person desires that witnesses should be brought before the commission, there would usually be no difficulty in obtaining a summons from the commission. Application would be made for that purpose through the Crown Solicitor, who is the solicitor appointed to instruct counsel appointed to assist the commission. It is the practice, Mr. Justice Manning understands, for witnesses to be examined in the first instance by counsel assisting the commission and then, if the examination may be continued or cross-examination instituted by counsel, as permitted by the commission. To keep an inquiry within bounds, the relevance of the evidence which it was desired to call would need to be indicated to counsel assisting the commission and the Crown Solicitor before a summons would be issued. Many people give evidence voluntarily before commissions, that is, without being summoned.

13. Point (*d*)(v). Should interested persons have an early right of reply to any criticism which has been made publicly?

Canada

See paragraph 12 above.

India

Although India has no provision dealing specifically with this point, it seems that it is covered in principle by the terms of Rule 4 of the Central Commissions of Inquiry (Procedure) Rules, 1960, already quoted.

The Law Commission of India make no recommendation.

Australia

In the words of Mr. Justice Manning: " It seems that interested persons should have this right as a matter of common fairness. No doubt in practice this right is given during the progress of the hearing of the commission where such a course is feasible."

14. Point (*d*)(vi). Should interested persons be given time to consider their evidence and prepare their answers in the light of other evidence?

Canada

See paragraph 12 above.

India

Here again, it seems that the point is covered in principle by the terms of Rule 4 of the Central Commissions of Inquiry (Procedure) Rules 1960, although no specific provision is made.

The Law Commission of India made no recommendation.

Australia

Mr. Justice Manning regards this as a matter of elementary fairness, and considers that a commissioner would afford time to an interested person to prepare his case. In New South Wales, he says, the practice is to hold a preliminary sitting and the date for the commencement of the "working sittings" is then appointed. It is not uncommon for counsel assisting a commission themselves to ask the commission for an adjournment at the preliminary session, in order to prepare the material for the inquiry. At one such preliminary sitting(1), the commencement date was fixed "unless there (was) good reason for a further adjournment, which (would) have to be the subject of another application".

15. Point (*e*). If a person incriminates himself by his own evidence in the course of the Tribunal's proceedings, should that evidence be inadmissible against him for subsequent civil or criminal proceedings?

Canada

This matter is covered by Section 5 of the Canada Evidence Act, Revised Statutes of Canada 1952, ch. 397, by virtue of, *inter alia,* Section 2 thereof, which has the effect of applying that Act to, *inter alia,* commissions set up under the Inquiries Act.

Section 5 provides that:

> "(1) No witness shall be excused from answering any question upon the ground that the answer to such question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person.
>
> (2) Where with respect to any question a witness objects to answer upon the ground that his answer may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this Act, or the Act of any Provincial Legislature, the witness would therefore have been excused from answering such question, then although the witness is by reason of this Act, or by reason of such Provincial Act, compelled to answer, the answer so given shall not be used or receivable in evidence against him in any criminal trial, or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury in the giving of such evidence."

Mr. McRuer adds that the fact that a witness claimed the protection of Section 5 may not be held against him in any subsequent proceedings.

Thus, a witness appearing before a commissioner appointed either under Part I or under Part II of the Inquiries Act is obliged to answer (although he may claim the protection of Section 5 in respect of his answer) the questions put to him, regardless of whether or not the answers thereto would be incriminating.

"Relevant" is the meaning given to the word "proper" in the phrase "any proper question" at Section 10(1)(*d*) of the Evidence Act, which provides that "Every person who . . . refuses to answer any proper question put to him by a commissioner, . . . is liable . . . to a penalty . . .". If the question is relevant, it is treated as "proper" and must be answered.

It is to be noted that under Canadian law a witness must himself claim the protection of Section 5 if he seeks to avail himself of it (Rex *v.* Mazerall (1946) Ontario Reports, 511, 513), and the tribunal has no duty to advise him of his rights: on the other hand, it is not improper for it to do so if it sees fit. M. H. Fyfe in his article cited above(2) criticised the Royal Commission on Espionage for its failure to "stretch a point, and let the witnesses know the extent of their privilege", on the ground that it had, seemingly, stretched its discretion against those witnesses in other respects.

Mr. McRuer is of the view that the policy of Section 5 of the Canada Evidence Act is right, and should prevail: he considers, however, that the law might be

(1) In the course of the proceedings of the Royal Commission of Inquiry into the Liquor Laws and allied subjects : preliminary sitting : July 30th, 1951.

(2) "Some Legal Aspects of the Report of the Royal Commission on Espionage" at page 781.

improved by a provision that the protection of the Act should be available whether or not it has been invoked during the hearing, save where the witness is charged with perjury arising out of the giving of evidence before a commission.

India

The relevant statutory provision is Section 6 of the Indian Act, which provides that,

> " 6. Statements made by persons to the Commission.—No statement made by a person in the course of giving evidence before the Commission shall subject him to, or be used against him in, any civil or criminal proceeding except a prosecution for giving false evidence by such statement: Provided that the statement—
>
> (*a*) is made in reply to a question which he is required by the Commission to answer, or
>
> (*b*) is relevant to the subject matter of the inquiry."

It may be noted that the protection given is expressed to extend to civil proceedings, which is not the case under the Canada Evidence Act.

The Law Commission of India considered Section 6 and recommended no change.

Australia

Section 17 of the New South Wales statute reads as follows:

> " 17. (1) A witness summoned to attend or appearing before the commission shall not be excused from answering any question or producing any book, document, or writing on the ground that the answer or production may criminate or tend to criminate him, or on the ground of privilege or on any other ground.
>
> (2) An answer made, or book, document, or writing produced by a witness to or before the commission shall not, except as otherwise provided in this section, be admissible in evidence against that person in any civil or criminal proceedings.
>
> (3) Nothing in this section shall be deemed to render inadmissible—
>
> (*a*) any answer, book, document, or writing in proceedings for an offence against this Act ;
>
> (*b*) any answer, book, document, or writing in any civil or criminal proceedings if the witness was willing to give the answer or produce the book, document, or writing irrespective of the provisions of subsection one of this section ;
>
> (*c*) any book, document, or writing in civil proceedings for or in respect of any right or liability conferred or imposed by the book, document, or writing.
>
> (4) This section shall not have effect unless in the letters patent by which the commission is issued the Governor declares that the section shall apply to and with respect to the inquiry."

It is apparent that the protection given by this Act extends to civil proceedings, as is the case in India.

The Australian Commonwealth Act contains a provision of similar effect, Section 6DD, which reads as follows:

> " A statement or disclosure made by any witness in answer to any question put to him by a Royal Commission or any of the Commissioners shall not (except in proceedings for an offence against this Act) be admissible in evidence against him in any civil or criminal proceedings in any Commonwealth or State court or any court of any territory of the Commonwealth ".

It seems that this provision has not yet been construed by any court, so that it has not been decided whether the protection conferred is confined to answers to questions put by a Commissioner, or extends to answers to questions properly put by others, whether appearing personally or by counsel. However, Mr. Justice

Manning informs me that the section has been treated as extending to answers to any questions put by anyone authorised by the Commission to ask questions. The generally accepted view, he says, is that the Commission is in complete control of the proceedings, and if a question is asked and allowed, then it is in effect put by the Commission.

Other Australian State statutes contain provisions of similar effect.

Section 30 of the Evidence Act, 1958 of Victoria clarifies the point noted above, in that it refers to "A statement made in answer to a question before a commission . . .". This section is also of interest in that it provides that a certificate signed by the chairman of the commission or sole commissioner to the effect that a statement was so made "shall be conclusive evidence thereof".

By Section 13 of the Evidence Act, 1906 of Western Australia a certificate of similar effect to the Victorian one noted above may be pleaded in bar to a prosecution, except for perjury in the proceedings in which the certificate was given.

16. Point (*f*). Should a Tribunal have power to certify persons for contempt? If not, how is a Tribunal to deal with a person who refuses to answer questions?

Canada

The relevant statutory provisions are Section 5 (under Part I) and Section 10(1)(*b*) and (*d*) (under Part II) of the Inquiries Act—the Canadian Statute, and Section 2 of the Public Inquiries Act—the Ontario Statute; they read as follows:

> "5. The commissioners have the same power to enforce the attendance of witnesses and to compel them to give evidence as is vested in any court of record in civil cases."
>
> "10. (1) Every person who
>
> (*b*) being commanded to produce any document, book or paper, in his possession or under his control, fails to produce the same;
>
> (*d*) refuses to answer any proper question put to him by a commissioner, or other person as aforesaid;
>
> is liable, on summary conviction before any police or stipendiary magistrate, or judge of a superior or county court, having jurisdiction in the county or district in which such person resides, or in which the place is at which he was so required to attend, to a penalty not exceeding four hundred dollars."
>
> "2. A commissioner has the same power to enforce the attendance of witnesses and to compel them to give evidence and produce documents and things as is vested in any court in civil cases."

India

The Report of the Law Commission of India deals at some length with contempt of court (in relation to commissions) of types other than mere silence, and also with the constitutional difficulties which apparently arise in India in connection with this offence.

The problem of a witness who merely declines to furnish the information sought from him is considered separately in the Report, and the Law Commission of India recommended that Section 5(2) of the Commissions of Inquiry Act, 1952, which provides that

> "The Commission shall have power to require any person, subject to any privilege which may be claimed by that person under any law for the time being in force, to furnish information on such points or matters as, in the opinion of the Commission, may be useful for, or relevant to, the subject matter of the inquiry."

should be amended by the addition at the end of the words "and any person so required shall be bound to furnish such information".

It is understood that this amendment (the recommendation has not been implemented, as has already been noted) would have the effect of providing a penal sanction which could be applied to a witness who declined to furnish information. It is also understood that the application of such a sanction would be distinct from proceedings for contempt of court.

It is not entirely clear from the Report to what extent, if at all, a witness is privileged from answering a question on the ground that his answer might incriminate him. However, it is clear that he is protected in respect of any incriminating answer which he does in fact give (see paragraph 15 above).

Australia

Mr. Justice Manning says that, as regards the position in New South Wales, Part II (entitled "Commissions") of the Royal Commissions Acts, 1912 to 1934, is in two divisions. Division 1 is entitled "Commissions Generally" and Division 2 is entitled "Commission to a Judge of the Supreme Court". The powers exercisable by a chairman of the commission or a sole commissioner who is a Judge of the Supreme Court as given by Division 2 are more extensive than those available under Division 1, and where it is desired to give the tribunal more effective powers it is customary to issue the commission to a Supreme Court Judge or to appoint a Judge chairman where the commission includes other persons. Section 18 in Division 2 of Part II provides that for the purposes of the inquiry the commissioner, if a Supreme Court Judge, (Section 15) shall have all such powers, rights and privileges as are vested in the Supreme Court or in any Judge thereof or in relation to any action or trial, in respect of the matters specified, including . . . (*b*) compelling witnesses to answer questions which the commissioner deems to be relevant to the inquiry and . . . (*d*) punishing persons guilty of contempt or of disobedience of any order or summons made or issued by the commissioner. It should be understood, however, that Section 14 provides that if in the letters patent by which the commission is issued, the Governor declares that all or any specified sections of the Act shall not be applicable for the purposes of the inquiry referred to in the letters patent, the sections or the specified sections, as the case may be, shall not apply to or with respect to the inquiry. In addition to Section 18 there are the provisions of Section 20 in Part III, which make it an offence if a person appearing as a witness before a commission refuses . . . to answer relevant questions etc. Division 1 of Part II contains a provision that a witness summoned to attend or appearing before the commission shall have the same protection, and shall, in addition to the penalties provided by the Act, be subject to the same liabilities in any civil or criminal proceeding as a witness in any case tried in the Supreme Court. Those provisions apply where the chairman or sole commissioner is not a Supreme Court Judge and therefore has not the powers under Section 18 that are referred to above.

The South Australian Royal Commissions Act, 1917 empowers the chairman of a commission to commit to gaol for any term not exceeding two months or to fine a person who refuses to answer any relevant question.

In the majority of States, so far as Mr. Justice Manning has been able to see the legislation, refusal to answer is made a punishable offence, but is not treated as punishable contempt.

17. Point (*g*). If a person is found to be innocent, the Tribunal should make this absolutely clear in their report.

Canada

Mr. McRuer does not consider that any rules on this point can usefully be laid down. The practice in Canada has been for the commissioner to clear any persons who were, in his opinion, innocent of wrong-doing.

India

It appears from the following quotation from pages 6 to 7 of the Report that Indian Commissions of Inquiry are at pains to clear persons found blameless: "It is true that in some cases, the Government does not take any action on the report of a commission of inquiry. But that does not mean that the

inquiry has not been useful. The commission either exonerates the person involved in the inquiry or holds them guilty. In either case the inquiry serves a useful purpose. In the first case, the inquiry sets at rest some ugly rumours which led to the appointment of the commission. In the second case, the guilty persons are exposed to the public eye ".

However, should it be decided in a particular case that the relevant commission of inquiry should not publish a report, it presumably could happen that persons against whom allegations had been made would never be publicly held to blame or exonerated. The fact that a report is not always published is evidenced by the following extract from paragraph 16, page 13, of the Report of the Law Commission of India:

> " Lastly it has been suggested that the Act should provide that the Report of a Commission of Inquiry should be published as soon as it is submitted to the Government. Whether a Report should be published or not will depend upon the nature of the inquiry and the Report made to the Government. There may be certain cases in which it may not be advisable to publish the Report. We, therefore, think that this matter should be left to the discretion of the Government."

Australia

Mr. Justice Manning says that in Australia, as in the United Kingdom, tribunals have always been alive to the necessity of clearing innocent persons in their reports.

18. Point (*h*). Should legal aid be available for interested persons appearing before a Tribunal, and, if an interested person is financially not eligible for legal aid, in what (if any) circumstances should his costs be met out of public funds?

Canada

In Mr. McRuer's views, interested parties should not, with one qualification, be given the right to legal aid, since the report of the commissioner does not alter their legal rights. He adds, however, that there may be cases where the commissioner should have the right to allow legal aid to indigent persons to advise them as to whether they should claim privilege under the Canada Evidence Act.

India

It appears from the relevant paragraph of the Report that the question of legal aid in relation to commissions of inquiry does not loom large in India.

However, the Law Commission of India stated their conclusion on the question whether the costs of " successful " interested persons should be paid by the State as follows:

> " In any inquiry of the nature under consideration which is held in the public interest, there are no parties. The Tribunal is a purely fact-finding body and does not adjudicate upon the rights of any persons. In these circumstances, we do not think that any provision should be made in the Act in respect of costs."

Australia

Mr. Justice Manning's comments are as follows:

> To a certain extent, he thinks, the answer would depend on the nature of the inquiry. In New South Wales legal aid in the strict sense is not available to witnesses appearing before commissions, but the Crown might perhaps make legal assistance available as a matter of grace where fairness appeared to require that course.

Apart from legal aid, the question whether costs of an interested party who had been given leave to be represented by counsel before a Royal Commission would be borne by the Crown, would now in New South Wales almost invariably be considered after the commission had furnished its report, and whether any payment were made by the Crown would, he thinks, depend for one thing upon the outcome of the commission in relation to that person.

He understands that the primary rule adopted by the New South Wales Government is that in general no reimbursement of costs should be granted, and that an *ex gratia* payment in respect of costs should not be made except in most exceptional circumstances. Where costs of an interested party were paid by the Crown, he does not think that the question of means is a determining factor.

Some years ago there was an inquiry concerning the operation of a statute which controlled the rents of certain premises. Mr. Justice Manning has been informed that the Public Solicitor, the official appointed under the Legal Assistance Act, provided legal representation for certain classes of tenants. This was done pursuant to an arrangement made by the Minister as a matter of administration outside the scope of the Legal Assistance Act.

Mr. Justice Manning has also been informed that in the case of the "Voyager" inquiry (referred to above) the Commonwealth paid the costs of certain persons involved, and thus appears to have recognised an obligation to pay the costs of interested parties who were granted leave to be represented at that inquiry.

India and Australia

19. It is interesting to note that the Law Commission of India recommended the inclusion in the Indian Act of a new provision closely following the existing Australian one (Section 6D(1) of the Commonwealth Act) which provides that:

> "Nothing in this act shall make it compulsory for any witness before a Royal Commission to disclose to the Commission any secret process of manufacture."

A personal view

20. In conclusion, I would like to express a personal view on a number of points.

(*a*) The position of the Attorney-General in regard to Tribunals of Inquiry set up in the United Kingdom under the 1921 Act.

It has been the common rule since the war for the Attorney-General to appear at such Tribunals, and to act in effect as counsel to the Tribunal with substantial control over the conduct of the proceedings. (A notable exception to this rule was the Waters Tribunal—in fact a Scottish Tribunal—which sat in 1959.)

In my opinion the practice is undesirable, and I would like to see the introduction of a system whereunder the Tribunal nominates independent counsel to fulfil this function.

Not only may the Attorney-General seem to the public to be associated with the Government of the day; he is in fact so associated. Notwithstanding the independence of his office, it is unwise, I suggest, that he should play a leading part in the conduct of an inquiry in which a Government Department, or even indeed a member of the Government with whom he might be personally acquainted (and known to the public to be so acquainted), may be an "interested person" in the sense used throughout this memorandum.

No matter how remote the real risk of bias, if an inquiry in which the Government is to some degree interested is conducted by a member of that Government, public suspicion is less likely to be allayed; and may be strongly aroused, if the Government's legal adviser is seen to play a leading part in the inquiry.

It may be said that Tribunals of Inquiry have been, and may yet be, set up under the 1921 Act in the outcome of which the Government is not directly interested, and of which the political implications are slight. Experience shows this is unlikely; but in such cases there would be no disadvantage in the Tribunal appointing its own counsel; and the great advantage would remain—the obvious independence of the Tribunal and its investigating procedures. Further there is advantage in a clear-cut rule applicable to all types of cases.

(*b*) The need for clarification of the function of a Tribunal of Inquiry.

It has often been stated that the function of such a Tribunal is to ascertain facts ; in other words to examine the hotchpotch of rumour and counter rumour, accusation and denial, which so often forms the background, if not indeed the subject matter, of the Tribunal's proceedings, and to arrive so far as may be possible at the truth. It has also been acknowledged that this function is not compatible, having regard to English conceptions of justice, with the subsequent prosecution of a witness, if appropriate, for a criminal offence, where the evidence against him consists of his own testimony before the Tribunal.

Clearly the Tribunal's search for the truth may have embarrassing consequences for the administration of criminal justice. I do not believe the dilemma—full investigation or subsequent prosecution but not both—can always be avoided. The appointment of a Tribunal and the scope of its terms of reference will have determined the policy question as to the course preferred—Tribunal's investigation or prosecution. Accordingly, in my view, once the decision in favour of a Tribunal inquiry has been made, the requirements of its investigation must prevail. Otherwise, instances will arise when an inquiry will be frustrated by a witness declining to answer a question on the ground that his answer might incriminate him. I would suggest, however, that the United Kingdom procedure would benefit in clarity and certainty, and thus ultimately in effectiveness, if the Act were to be amended by the incorporation of a provision of similar effect to Section 5 of the Canada Evidence Act (see paragraph 15 above). Mr. McRuer's proposed amendment of this section would, it is submitted, be an improvement. I also think there is merit in the Indian proviso that the answer must be either one he is required to give or relevant to the subject of the inquiry.

It may be noted in conclusion that the section in no way inhibits the prosecution or conviction of a witness on the basis of evidence other than his own. It is thought that a specific statutory provision covering this point would make it unnecessary for the future to give a witness an assurance that he would not be prosecuted, as has been done in the past.

(*c*) The problem of costs.

It has often been said that the present position in regard to costs, namely that, as the proceedings of a Tribunal or Inquiry are not legal proceedings in the accepted sense of that term, a person who has been legally represented may not recover the costs thereby incurred, is unsatisfactory. I share this view, and would be in favour of a statutory provision enabling a person to recover the costs of his legal representation from the State, if the Tribunal should think it just so to order. The Tribunal could sit to deal with applications for costs, which would be notified in writing in advance, following the publication of its report. It may be noted that the allowance of legal representation is itself a matter for the Tribunal, and in this way it would have a double control over costs.

I feel that the extension of legal aid to proceedings before Tribunals, even for those financially eligible under the present system, would be of little advantage. It is of the essence of the present system that legal aid should be sought in advance of the hearing, the prospects of success in the " action " of the holder of a certificate being of decisive importance when the authorities consider from time to time whether that certificate should be continued or withdrawn. I see little prospect of applying this criterion to the proceedings of a Tribunal of Inquiry.

(*d*) From a study of the Canadian, Indian and Australian systems, it emerges that an important question is whether the protection of persons likely to be adversely affected by a Tribunal's investigation should be regulated by mandatory provision contained either in the statute or rules made under the statute, or whether it should be left to the discretion and sense of justice of the Tribunal. It will be observed that India has opted in favour of mandatory provision ; see Rules 4 and 5, Central Commissions of Inquiry (Procedure) Rules, 1960 cited in paragraph 10 above. Canada has not evolved any rule as clear-cut as India, though in certain circumstances persons likely to be prejudiced have by statute

a right of representation and of notice: see also paragraph 10. Australia really leaves the protection of interested parties to the discretion of the investigating body. I think it is a nicely balanced question which is the better course—to write into the law the protective provisions, as India has done, or to leave the matter to the discretion of the Tribunal.

The Indian Law Commission clearly thinks it necessary that the protection of the individual should be enshrined in the statute: see paragraph 12 above. But there is much to be said for Mr. Justice Manning's point that leaving the problem of protection to the discretion of the tribunal enables the tribunal to maintain an effective control of the inquiry. It is not difficult to envisage circumstances in which, if rights unfettered by the tribunal's discretion be granted, a person interested in defeating or embarrassing the inquiry might use them to impose upon the tribunal an unacceptable measure of delay. An instance would be the powers of delay and embarrassment available to a vexatious person if he had an uncontrolled right to produce evidence. I suggest that the true principle must be that once both Houses of Parliament have resolved that it is expedient that there should be the inquiry into a definite matter of urgent public importance the requirements of the inquiry must be paramount. It does not of course follow that other interests must be rejected. I would submit that in the United Kingdom, where Tribunals are usually chaired by a judge or other lawyer of experience and distinction, it is unnecessary to write into the statute mandatory provisions for the protection of interested persons.

It may, however, be thought that the Act of 1921 fails to give any sufficient guidance to the Tribunal. I would think that this is a fair point and that it would be helpful to state in the statute those protections which an interested party can claim while making it absolutely clear that they are to be made available only at the discretion of the Tribunal.

Although I think that the Ontarian right of appeal by case stated is an interesting method of control, I doubt if it is necessary in our jurisdiction. Again, in the hands of an unscrupulous person it might lead to serious delay in the work of the Tribunal, which is by definition work of urgent public importance.

MEMORANDUM OF EVIDENCE SUBMITTED BY THE RT. HON. LORD SHAWCROSS

1. The English or Anglo-Saxon system of governmental and legal administration seems to exclude, more than any other, methods which are inquisitorial in their nature. But this is not to say that the English procedures are better; other countries, using other methods, achieve justice and sound administration.

2. I have no doubt myself that there are from time to time matters which require public inquiry but which are not justiciable or in which normal judicial procedures would not necessarily arrive at the real truth in cases in which the public interest demanded that the real truth, as distinct from objective truth established in accordance with the peculiar English rules of the game—that is, with the law of evidence—was required. For these some form of inquisitorial procedure is essential.

3. At one end of the scale is the system of Royal Commission, which is nowadays more normally used to study and report upon broad problems of policy but which can be used in cases where individual conduct is in question. A distinguished German commentator has said that we use this method because of our inherent distrust of the official and of bureaucracy. Certainly we do use it because we do not wish to involve officials in any matter which may fall into the arena of party politics or become the publicised basis of possibly controversial policy. Equally we do not use the machinery of Parliament, e.g. by Select Committees, because we know by bitter experience that party political considerations may obstruct objective inquiry or cloud impartial judgment.

4. Mid-way between the Royal Commission and the statutory Tribunal of Inquiry is the *ad hoc* tribunal consisting of one or several independent persons, often a judge or eminent barrister, to inquire into some particular matter and report. This was the method used in the case concerning Mr. Profumo, and in the case concerning the convicted murderers Evans and Christie. Theoretically this method may seem to have little to support it; the procedure is informal and sometimes secret; there is no power to insist upon witnesses giving evidence or to call for documents and the person who conducts it often has to be both inquisitor and judge. None the less the system works well in practice.

5. But there are some cases of apparently graver public concern, where a more formal inquisitorial system does seem to me to be necessary. These are the cases in which serious public disquiet has been or is likely to be aroused and where what is involved really goes to the root of honest and proper public administration. It is for Parliament, as advised by the Government, to decide if and when such a case has arisen. Admittedly this is a formidable procedure: sometimes it may lead to injustice to individuals. Consequently it should be used rarely, and reserved as the State's ultimate weapon in cases of grave public importance where the use of compulsory powers of interrogation is the only way likely to satisfy the public that the truth has really been ferreted out. I am in favour of retaining the existing statutory machinery for Tribunals of Inquiry although sometimes it may only be necessary to set the inquiry on foot in order to demonstrate that no inquiry was really necessary.

6. It is not likely that a Sovereign Parliament would or could ever abandon its right to inquire into particular matters by a Select Committee. Yet Select Committee procedures are more capable of injustice to individuals than those of the statutory Tribunal. Thus the Select Committee has power not only to find the facts but to punish. It may be strongly influenced by political prejudices, but those under examination have no right to legal representation nor can they refuse to answer incriminating questions. The Committees lack judicial experience in investigating facts: their conclusions must lack the appearance of impartiality. The statutory Tribunal therefore is the preferred instrument of inquiry when Parliament concludes that some matter is so important as to need such an investigation.

7. In my view, the Attorney-General should continue to have a general responsibility for presenting the case to the Tribunal. Suggestions that this should be done by an "independent" legal officer are misconceived. The Attorney-General is an independent legal officer in the discharge of his public functions and it is of the utmost importance that he should continue to be and to be seen to be such. It is true that some cases may involve the conduct of his political colleagues. So directly or indirectly may cases involving the even more serious question of criminal or other proceedings and it has not yet been suggested that the ultimate responsibility for deciding whether or not to set the criminal law in motion should be removed from the Attorney-General. Traditionally, the Attorney-General has been regarded as being in legal matters the representative of the public interest, never influenced by party political considerations. As the occasions for intervention by the State in the affairs of private citizens multiply and the power of the bureaucracy increases, it is all the more important that the Law Officers should regard themselves, and be seen to be, acting on behalf of the public; there is no one else who can.

8. If it is said that in the J. H. Thomas case the Attorney felt some inhibitions about this and had formed some personal opinion as to the innocence of Mr. Thomas, it must be replied that Attorneys-General should be made of sterner stuff; it is not their business—any more than it is the business of an ordinary barrister—to form personal opinions about the guilt or innocence of their colleagues. Of course it may happen that they have themselves been personally involved in the matters under investigation (as might easily have happened in the Stanley case when in fact the Solicitor-General's name had been included in the vague cloud of rumour) or that they have mistakenly taken upon themselves the duty of advising some individual as happened—unfortunately

as I think—in the case of Mr. Profumo. In such a case clearly they are disqualified from, and would not dream of, acting. But in that case they would nominate the senior member of the Bar, possibly an ex Law Officer if available.

9. In the Stanley case, the question whether the Attorney should act was, at the beginning very much in issue and was publicly questioned by Lord Simonds who, however, I think, later withdrew his objection. The Tribunal considered the matter and expressly concluded that in their view it was in the public interest that the Attorney should act. They so informed me publicly and I would have regarded it as an abdication of my responsibility and damaging to public confidence in our whole system if I had taken the easier way out.

10. If the Attorney is not to act, who should appoint the independent Legal Officer?

11. For the rest, I think the existing procedure generally right, although I would provide free legal aid for interested parties as of right, and allow the Tribunal a discretion, to be exercised very occasionally, to hear evidence in private.

12. I agree that occasionally, but not often, injustice may result to individuals. I am afraid I fall back on the axiom that in these grave cases, almost *ex hypothesi, salus populi : suprema lex.*

MEMORANDUM OF EVIDENCE SUBMITTED BY H.M. TREASURY

1. The reasons why it was proposed to set up the Security Commission were explained in the House of Commons by Mr. Harold Macmillan on 7th May, 1963 and by Sir Alec Douglas-Home on 16th December, 1963. The decision to set up the Commission, and its procedure, were announced by Sir Alec Douglas-Home on 23rd January, 1964. On 10th May, 1965 (in the course of the statement referred to in paragraph 2 below) the Prime Minister explained an alteration in the procedure to be followed in future. The relevant extracts from Hansard are in the Annex.

2. The Prime Minister informed Parliament in his statement on 10th May, 1965 that the Security Commission had been asked to investigate the cases of Bossard and Allen. The statement which he made on 22nd July, 1965 about the Report of the Commission (Cmnd. 2722) is also in the Annex.

3. The Treasury is submitting this memorandum to the Royal Commission because:

(*a*) the statement of 23rd January, 1964 explained that, exceptionally, if the Security Commission found that it was unable to make progress without powers to compel evidence, Parliament would be asked to pass the necessary resolutions under the Tribunals of Inquiry (Evidence) Act, 1921 to vest the Commission with the powers of that Act for that particular inquiry ; and

(*b*) when the Prime Minister announced the setting up of the Royal Commission on 22nd July, 1965, he said:

> "While we have seen alternative procedures develop—for example, the Security Commission, and the one-man Denning inquiry,—I do not think that we are quite satisfied that we have yet found the right answer. I think that it will be helpful if the Royal Commission is able to study, in the case of some of the alternatives which have been developed, whether there are defects in the procedures which could be improved, so that recourse to the Tribunal may be as rare as possible."

See also his answer to a Question by Mr. Marten M.P. on 2nd August, 1965 (given in the Annex).

4. The Prime Minister said, in his statement on 22nd July, 1965 about the report of the Security Commission, that this report had pointed to the problem which arose where individual civil servants or serving officers might be held by the Commission to have been at fault.

The remedy adopted on this particular occasion was as follows:

(i) The actions of the serving officers who were subject to the Army Act were to be referred to the Army Board for investigation and decision whether the facts showed a *prima facie* case for disciplinary action under the Act.

(ii) As regards the civil servants concerned, a Board of Inquiry was to be set up to examine the facts and to assess the nature and gravity of any neglect of duty which might have occurred in order to assist in deciding whether disciplinary action was required. The civil servants appearing before the Board might be appropriately represented if they so wished.

The Prime Minister said, however, that it might be that some other procedure would serve better in future.

5. The Report of the Board of Inquiry was published in September, 1965 (Cmnd. 2773). A statement issued from 10 Downing Street on 27th September, 1965 is in the Annex.

6. The procedure followed by the Security Commission was publicly criticised on these grounds:

(*a*) Individuals were criticised in the report without having been told that this was going to happen and without having been given any opportunity of defending themselves against the criticisms.

(*b*) These individuals were not represented before the Commission.

(*c*) Since they were not given access to the papers about which they were being questioned, they were not able to refer to their own notes which formed part of the official files and referred to matters which had taken place many years previously.

7. There is a real problem here. The Security Commission may have to operate very quickly; its freedom of manoeuvre may be affected by considerations of national security; and in future (see the Prime Minister's statement of 10th May, 1965) it may operate in secret if criminal proceedings are still pending before the courts. For these reasons, it does not seem possible to prescribe in detail specific rules of procedure which the Commission must follow.

8. Even though the provisions of the 1921 Act which apply to the procedure to be followed by Tribunals may be changed in the future, it seems likely that the reasons which led to the setting up of the Security Commission will still remain valid. Moreover it would seem that the difficulties which arose on the one occasion on which the Security Commission has so far been activated could be overcome if in future the Security Commission were to function broadly on the following lines:

(i) Although the Security Commission would not be bound by detailed rules of procedure, it would be expected to follow the general pattern of any procedure which may be laid down for formal Tribunals of Inquiry so far as this was consistent with the nature of the investigation by the Security Commission.

(ii) It would be within the discretion of the Security Commission to permit a witness to be accompanied by his legal adviser or other representative; and, in general, the Commission would be expected to exercise this discretion when the actions of a witness might have put him at risk of criticism.

(iii) It should be the normal practice, to be departed from only on grounds of national security, for a witness to be allowed to look at any relevant papers with which he himself dealt at the time of the matters under inquiry.

(iv) The published version of a Report by the Security Commission should not identify individuals subjected to criticism in the Report, unless they had been given an opportunity to answer this criticism.

(v) Any subsequent investigation of individual conduct would be carried out as a normal disciplinary investigation.

ANNEX A

Extract from speech by the Prime Minister (Mr. Harold Macmillan) in House of Commons debate on Vassall Tribunal Report on 7th May, 1963

I therefore put forward for the House's consideration a plan that I have discussed with some of my advisers, and on which I have already spoken to the right hon. Gentleman the Leader of the Opposition. It might well be advantageous to set up a small standing body—a permanent body—to act as a Security Commission. This might consist of a judicial chairman, assisted and supported by two other members. Those who have had experience of the problems of maintaining security in the public services might well have a valuable contribution to make in this. In addition, we might have a small standing committee of Privy Councillors from both sides of the House.

It would then be possible for the Government to decide, after consultation with the Privy Councillors, whether in any particular case an inquiry by the Security Commission was called for. The responsibility for the decision whether to invite the Security Commission to conduct an inquiry must, naturally, rest with the Government of the day, but they would be fortified and assisted in their decision by consultation with the Privy Councillors.

The question of powers would then remain. There might be cases in which the full powers conferred by the 1921 Act were necessary, but here, perhaps, the initiative might rest with the Security Commission itself. If, at the outset—or, indeed, at any stage of its investigation—the Security Commission felt that its inquiries could not be effective without powers to compel evidence, it would so inform the Government. Parliament would then be asked to pass a Resolution conferring on the Commission, for that particular inquiry, the powers under the Act of 1921. But there might be many cases in which the Commission did not think that that was necessary, so that this rather formidable engine would not be brought automatically into play.

Of course, after the inquiry was held, the Security Commission would report to the Government, and the Prime Minister of the day would consult the standing committee of Privy Councillors when the report had been received.

... ...

What I want to make clear is that this proposal that I am seriously making—and I think that the hon. Member for Dudley (Mr. Wigg) would also like to take it seriously—has the merit of retaining the responsibility for executive decisions where it ought constitutionally to belong but, at the same time, it would take account of the fact that the security of the State transcends the varying policies of successive Governments and is the concern of all Members of Parliament, and is a matter in which, I think, the Privy Councillors, by the nature of their oath, may have a special part to play. We have not reached conclusions. We throw out the suggestion for discussion, and I think that it might lead to a structure that will be generally acceptable.

ANNEX B

Statement by the Prime Minister (Sir Alec Douglas-Home) on 23rd January, 1964. *(House of Commons Hansard Cols.* 1271–1272)

Mr. H. Wilson (by Private Notice) asked the Prime Minister whether he is in a position to make a further statement about the machinery for dealing with inquiries on security?

The Prime Minister (Sir Alec Douglas-Home): I apologise to the House for the fact that this is a rather long statement, but it is important.

In the debate on 16th December I described in outline the Government's proposals for a Standing Security Commission and proposed further consultation with the right hon. Gentleman the Leader of the Opposition.

The right hon. Gentleman and I have had further discussions about this and in the light of them the Government have decided to set up a Security Commission with the following terms of reference:

If so requested by the Prime Minister, to investigate and report upon the circumstances in which a breach of security is known to have occurred in the public service, and upon any related failure of departmental security arrangements or neglect of duty ; and, in the light of any such investigation, to advise whether any change in security arrangements is necessary or desirable.

Mr. Justice Winn has agreed to serve as Chairman and the other members will be Lord Normanbrook and Sir Caspar John. The Cabinet Office would provide the Secretary of the Commission.

Before asking the Commission to investigate a particular case, the Prime Minister will consult with the Leader of the Opposition.

Under the terms of reference, the Commission could be called upon to act if there had been a breach of security even though there had been no conviction—perhaps because the individual had fled the country.

Normally, the Commission would sit in private and would examine the witnesses themselves.

Usually, it would be unnecessary for any of the witnesses to be legally represented. But it is impossible to foresee all the circumstances, and the Commission would be authorised to permit a witness to be accompanied by his legal adviser if satisfied that his interests required such protection.

Exceptionally, the Commission might find that they were unable to make progress without powers to compel evidence. In such a case, Parliament would be asked to pass the necessary Resolutions under the Tribunals of Inquiry (Evidence) Act, 1921, to vest the Commission with the powers of that Act for that particular inquiry. The Commission would then proceed in all respects as a Tribunal of Inquiry.

The decision whether to sit in private or in public would be governed by the relevant statutory provision, and the normal procedure for having the case presented by counsel and for allowing legal representation would apply. When legal representation was allowed (under either paragraph 6 or paragraph 7) the Commission would be asked to advise whether an *ex gratia* contribution to the cost of such representation should be made from public funds.

In the ordinary case the Commission would report direct to the Prime Minister. When the Commission had been constituted a Tribunal of Inquiry, the report would formally be submitted to the Home Secretary, as required by the 1921 Act. But in either case the Leader of the Opposition would be consulted by the Prime Minister when the report was received. The report would be made public to the extent that this was consistent with security considerations.

ANNEX C

Statement by the Prime Minister (Mr. Harold Wilson) on 10th May, 1965

(House of Commons Hansard Cols. 34–35)

The Prime Minister (Mr. Harold Wilson): With permission, Mr. Speaker, I wish to make a statement.

As the House will know, there have been two recent breaches of security and today, Mr. F. C. Bossard, of the Ministry of Aviation, and Staff Sergeant P. S. Allen, of the Army Department, pleaded guilty at the Central Criminal Court to offences under Section 1 of the Official Secrets Act. I have accordingly asked the Security Commission to investigate the circumstances in which these breaches of security have occurred in the public service, and to advise in the light of their investigation whether any change in security arrangements is necessary or desirable. Lord Justice Winn and his colleagues will begin their work forthwith.

I must, however, tell the House that these two cases have revealed a difficulty about the working of the Security Commission which was not foreseen when its establishment and terms of reference were announced by my predecessor in two statements on 16th December, 1963 and 23rd January, 1964. It was then envisaged that an announcement in this House would be made as soon as a reference was made to the Commission. But the House will recognise that

where court proceedings are pending an annoucement of this kind, involving an assertion that a breach of security has occurred, might in certain circumstances be thought capable of prejudicing a fair trial of the accused. But to delay the activation of the Commission until the matter was no longer *sub judice* might involve months of delay and seriously prejudice the effectiveness of the Commission's inquiries.

I have told the right hon. Gentleman the Leader of the Opposition about this problem, and I propose to alter the procedure so that a reference can be made to the Commission as soon as the Government are satisfied, or have good reason to think, that a breach of security has occurred in the public service. In each case I propose that the Leader of the Opposition be informed before a reference is made. But when a reference to the Commission relates to a matter which is the subject of criminal proceedings before the courts, then, for the reason I have explained, no public announcement of the reference to the Commission would be made until it is appropriate to make a statement.

On the present occasion, because the Security Commission could not begin its investigation while the cases were still *sub judice,* and because it seemed to me that there might be apparent weaknesses requiring immediate remedy, I had to take other action. I decided, therefore, as soon as the arrests were made and there was a *prima facie* breach of security, that there should be a preliminary inquiry within the Government Service. I therefore appointed a committee of senior officials under the chairmanship of the Head of the Home Civil Service, Sir Laurence Helsby, to examine the circumstances in which these two men had been charged with offences under the Official Secrets Act and to consider whether, and if so what, weaknesses in the security arrangements of the two Departments were indicated by the circumstances. This Committee has now reported to me and its report, which includes a statement of certain action already taken, will be made available immediately to the Security Commission.

It is already clear that in certain respects affecting the investigations necessary before an individual public servant is put on to work involving access to highly sensitive material, and also in the variations in the procedure of individual Departments on matters affecting Departmental security immediate action needed to be taken, and has been taken. The Commission will, of course, be completely free to comment on all these matters and to advise on the adequacy of the measures which are now being put into effect. The House will understand that pending the Report of the Commission it is difficult for me to say more about these individual cases. When the Report is received, and following precedent, seen by the Leader of the Opposition, I will make a further statement to the House.

But there is one thing I want to say now. The Security Service operates far removed from public gaze. When public attention does fall on them it is through breaches of security which, whatever their nature, are bound to lead to criticism of security arrangements in the public service. It is plain that the Service deserves the thanks of us all for a job well done.

ANNEX D

Statement by the Prime Minister (Mr. Harold Wilson) on 22nd July, 1965

Tribunals of Inquiry (Evidence) Act, 1921

(Royal Commission)

The Prime Minister (Mr. Harold Wilson): With permission, Mr. Speaker, I wish to make a statement.

In recent years anxiety about the working of the Tribunals of Inquiry (Evidence) Act, 1921, has been expressed on every occasion on which the report of a tribunal set up under the Act has been debated in this House.

Her Majesty's Government have given careful consideration to this matter, and I am now able to announce that the Queen has been pleased to approve the recommendation that a Royal Commission should be appointed, with the following terms of reference:

To review the working of the Tribunals of Inquiry (Evidence) Act, 1921, and to consider whether it should be retained or replaced by some other procedure, and, if retained, whether any changes are necessary or desirable; and to make recommendations.

The names of the chairman and members of the Royal Commission will be announced later.

Sir Alec Douglas-Home: May I say that I think we have not yet achieved the ideal way of dealing with these matters and that a Royal Commission would be a very good way of trying to find the right way?

The Prime Minister: I think that the right hon. Gentleman is absolutely right. There has been anxiety for a number of reasons about the tribunals. While we have seen alternative procedures develop—for example, the Security Commission, and the one-man Denning inquiry—I do not think that we are quite satisfied that we have yet found the right answer. I think that it will be helpful if the Royal Commission is able to study, in the case of some of the alternatives which have been developed, whether there are defects in the procedures which could be improved, so that recourse to the tribunals may be as rare as possible.

Mr. Grimond: I take it that the Royal Commission will report fairly quickly, otherwise it would seem to suspend the working of the procedure while it is considering it. Secondly, this is a matter which affects Parliament, and peculiarly this House, and it will be rather a pity if we have no opportunity to debate it, so that the views of the House may be before the Commission. Can the Government find a way to inform the Commission of the views of the House?

The Prime Minister: Any hon. Member will be free, of course, to give evidence singly or in any grouping or party sense. It may be that hon. Members will be invited to serve on the Commission. I would certainly feel that when the Report is available from the Commission we shall want to study it. There has been great difficulty about whether to suggest a Select Committee. After all, there is parliamentary responsibility here. But so much is involved in the procedure of the Commission and there is so much of natural justice in its functioning that we thought it right to have a Royal Commission.

Mr. Bellenger: May I congratulate my right hon. Friend on bringing the matter at any rate to some sort of climax? May I reinforce the remarks of the Leader of the Liberal Party about the Royal Commission taking a considerable time and the urgency of the matter, which is now about 40 years old? This is something which the House ought to take into consideration. My right hon. Friend has decided on a Royal Commission in preference to a Select Committee. I suppose that it is too late to change that decision. However, will he say that the matter will be dealt with with urgency?

The Prime Minister: Yes Sir. I hope that it will be able to be dealt with as quickly as possible and that the Report will not take too long. But a lot of anxieties have been expressed. The Leader of the Opposition, from this Box, expressed some anxieties about the matter. I think that these are fairly general in the House, although we have not yet found a satisfactory alternative.

ANNEX E

Extract from the statement by the Prime Minister (Mr. Harold Wilson) on 22nd July, 1965. Security Commission (Report on Bossard and Allen cases)

As hon. Members have not yet had an opportunity of reading the Report, I do not propose to comment on it in detail, but I should tell the House that the Commission has referred to the actions of individual civil servants and members of the Armed Forces, and its comments raise the question whether these individuals may have committed some offence against discipline.

I have, therefore, decided that the actions of the serving officers concerned, who are subject to the Army Act, should be referred to the Army Board for investigation and decision as to whether the facts show a *prima facie* case for disciplinary action under that Act. In the case of the civil servants concerned,

I have decided to appoint a board of inquiry to examine the facts and to assess the nature and gravity of any neglect of duty which may have occurred in order to assist in deciding whether disciplinary action is required. The individual civil servants who will appear before the board may be appropriately represented if they so wish. The members of this board will not be serving civil servants.

In this connection, I would remind the House that in my statement on 10th May I explained that the original concept of the Commission, which was announced by the right hon. Gentleman the Leader of the Opposition on 23rd January, 1964, after consultation with me, was defective because the Commission could not begin its operations in a case which involved court action resulting from a breach of security until the case had been concluded. In the present cases we overcame this difficulty by asking a small committee, under the chairmanship of Sir Laurence Helsby, to carry out a preliminary, confidential inquiry. The Security Commission, in its report, paid tribute to the usefulness to them of the work of this inquiry and acknowledged that valuable steps were thus able to be at once taken whilst the prosecutions were pending.

For the future, the procedure has been altered so that a reference can be made to the Security Commission as soon as the Government are satisfied or have good reason to think that a breach of security has occurred in the public service.

The Report of the Commission on this occasion has, however, now pointed to the further problem which arises where individual civil servants or serving officers may be held by the Commission to have been at fault. The remedy we have adopted this time is, as I have said, to institute further investigations specifically directed to the acts of the individuals concerned and during which they may be advised and represented. It may be that some other procedure would serve better in future and this is a matter which must be considered in due course.

One last point—and I apologise for the length of this statement, Mr. Speaker. The investigation on this occasion—the first on which the Security Commission has operated—has put a heavy burden on the three members of the Commission. I hope that we shall not often need to ask the Commission to act, and there is at this time no case pending which would suggest that it will have to be activated again in the near future. Nevertheless, Lord Justice Winn and his colleagues have suggested that it would be prudent to enlarge the membership of the Commission, and with the agreement of the right hon. Gentleman the Leader of the Opposition I propose to accept this suggestion. On any future occasion when a reference is made to the Commission, it will still be the practice for three members to sit, but they will be drawn from a larger total. I shall announce the additional names as soon as I can.

ANNEX F

Question by Mr. Marten, M.P., and written answer by the Prime Minister on 2nd August, 1965

Standing Security Commission (Bossard and Allen cases)

Mr. Marten asked the Prime Minister if all those who assisted or were interviewed or gave evidence to the Standing Security Commission which investigated the Bossard and Allen cases were warned that their evidence might be published or used as the basis of disciplinary action; and if he will make a statement.

The Prime Minister: Evidence given to the Commission will not, in fact, be the basis of any disciplinary action, and I understand that in these circumstances the Commission felt it unnecessary to give any warning to witnesses. I explained in my statement of 22nd July that separate inquiries would be made into the actions of individuals, and that the Royal Commission on Tribunals would have authority to inquire into the procedures appropriate for other types of investigation of security and allied subjects.

ANNEX G

Statement from 10 Downing Street following publication of Wilson-Smith Board of Inquiry, 27th September, 1965

When the Prime Minister made his statement in the House of Commons on 22nd July on the report of the Security Commission on the Bossard and Allen cases, he announced that a Board of Inquiry was being set up to examine the

facts and to assess the nature and gravity of any neglect of duty which might have occurred on the part of the civil servants criticised in the Security Commission's report. The actions of the serving officers named in the report were referred to the Army Board for investigation and decision as to whether the facts showed a *prima facie* case for disciplinary action under the Army Act.

The Board of Inquiry, under the Chairmanship of Sir Henry Wilson-Smith, has made its report to the Prime Minister and that report is being published in full today. Its findings have been considered by the Secretary of State for Defence and the Minister of Defence for the Army. The report exonerates the civil servants concerned from the criticisms made of them by the Security Commission. The Ministers, with the approval of the Prime Minister, have decided that no disciplinary action is called for on those counts. The report does however make certain other criticisms of Mr. Stopford; and the Minister of Defence for the Army has informed Mr. Stopford that, while he is very glad that the report clears him of the more serious shortcomings attributed to him by the Security Commission, he has noted these criticisms with regret. Mr. Stopford is not now, and has not been for five years, in the post of Establishment Officer in which his actions have been called into question; and the Minister does not consider that this episode should lead to loss of confidence in him in his present appointment.

After investigation into the cases of the two serving officers criticised by the Security Commission, the Army Board has found that their actions were in no way responsible for Allen's offences. Nevertheless there were certain failings of duty on the part of both officers. Colonel Porteous has accordingly received a formal warning and Major McIver has been rebuked.

MEMORANDUM OF EVIDENCE SUBMITTED BY THE Rt. Hon. LORD UPJOHN, C.B.E.

1. You have asked me to express my views upon the memorandum prepared for you by Mr. J. F. Donaldson, Q.C., and I gladly do so.

2. I agree entirely with Mr. Donaldson that there is a need for a general statutory power to establish Tribunals of Inquiry. Experience has shown this to be so and I would think could hardly be disputed.

3. Mr. Donaldson's main theme seems to be that the power to appoint such a Tribunal should be vested in the Lord Chancellor or some other high officer of State rather than by resolutions of both Houses of Parliament under the present procedure of the 1921 Act.

(*a*) With this view I personally disagree. While there is a need to have a statutory power to establish a Tribunal of Inquiry, these Tribunals should be appointed as infrequently and as sparingly as possible in my opinion. They are essentially inquisitorial, a form of procedure disliked not only by the lawyers but by the British public and rightly. It may well work injustice and unfairness to some of the witnesses and particularly those who may not be represented by counsel. And finally it is disruptive of the ordinary work of the courts for it takes away one or more of the higher ranking members of the judiciary and a number, and sometimes a great number, of counsel as, for example, in the Lynskey Tribunal (of which, alas, I am the sole surviving member) from the ordinary work of the courts, whose duties are already overpressed, particularly in the Queen's Bench Division.

(*b*) My personal view is that if the power to appoint a Tribunal under the 1921 Act is vested in an officer of the Government, however high ranking, there would be more of them, for it would be so easy for the Government of the day, of whatever colour, to stifle difficult questions in either House by stating that a Tribunal of Inquiry had been appointed to look into the matter. As it is, under the present procedure, Parliamentary time has to be given in both Houses to the consideration of the appointment of a Tribunal and this allows the matter to be ventilated thoroughly in

Parliament, questions asked and answered, and a full debate heard upon the matter before it is appointed. No Government is willing to give up Parliamentary time to such a debate unless it is a most serious matter on which the public require some reassurance. This, I think, will ensure that these Tribunals are only set up in the most important and difficult cases where there is, to use Mr. Donaldson's words, something approaching a crisis of public confidence or some question arises which the public and the Government think must be investigated by the highest form of tribunal of inquiry.

(*c*) There is, too, the point which I think is not without importance that if the appointment of a Tribunal is left to the Lord Chancellor this would be a Government decision, perhaps, as I have mentioned, taken too quickly; whereas under the present system the appointment of the Tribunal is by Parliament after full debate. This, I think, is an important difference as a matter of presentation to the public.

(*d*) For these reasons I dissent from the views expressed by Mr. Donaldson in paragraph 21 of his memorandum. Incidentally, his implied view that majorities in the House of Lords are governed by the same considerations as in the House of Commons seems open to argument.

(*e*) So I would retain the present procedure for the appointment of a Tribunal under the 1921 Act.

4. Mr. Donaldson discusses at some length in paragraph 5 of his memorandum other tribunals which a Minister may appoint such as the Air Accident Inquiries, Wreck Inquiries to which should be added inquiries into the affairs of companies under Sections 164 and 165 of the Companies Act, 1948 under which inquiries are frequently ordered. A statutory power to order such inquiries in such classes of cases is most necessary but they do not seem to me, with all respect to Mr. Donaldson's memorandum, to touch on the real problem before the Royal Commission.

Incidentally it is interesting to note the very restricted power to summon witnesses which Parliament has very rightly thought fit to impose upon tribunals appointed under the Companies Act. See Section 165. They have a limited jurisdiction for a limited purpose. Plainly a Tribunal under the 1921 Act, or any Act replacing it, must have much wider powers and here I may conveniently add I entirely agree with paragraph 18 of Mr. Donaldson's memorandum.

No doubt the 1921 Act was framed like Section 165 of the Companies Act on this footing that the chairman might not be a member of the higher judiciary. Under the Companies Act in practice he never is; under the 1921 Act in practice he always is at least a High Court Judge and in such cases the Tribunal should have powers similar to those of the Restrictive Practices Court.

5. As to procedure, I agree with much that Mr. Donaldson says. I remember having a brief for one of the minor characters in the J. H. Thomas Budget Leak Inquiry in 1936 when the then Attorney-General (Sir Donald Somervell, Q.C.) refused to take any part in the cross-examination of the witnesses or presenting the case or doing otherwise than tender the witnesses for examination. This embarrassed the Tribunal for they had to take it in turns to cross-examine, and sometimes of course quite severely, the witnesses before it. This presented the inquisitorial method of procedure at its worst and I think the members of the Tribunal cordially disliked it.

6. All this was altered by the method of procedure we devised in the Lynskey Tribunal in 1948 made possible by the great courage and independence (in the finest traditions of the Bar) of the Attorney-General, Sir Hartley Shawcross (as he then was). This is succinctly set out in paragraphs 3–7 inclusive of the Report of the Lynskey Tribunal so I do not repeat it here. This set the pattern for the later Tribunals mentioned by Mr. Donaldson and I am very glad that it has been expanded in the manner mentioned in paragraph 10 of his memorandum. I

venture to suggest that the real problem here is whether there should not be power in any Act replacing the 1921 Act to lay down rules of procedure to ensure that the practice set by the Lynskey Tribunal should be followed and to prevent any reversion to the J. H. Thomas practice; or whether this may safely be left to the good sense of those concerned.

7. Mr. Donaldson refers to the dual role of the Attorney-General in paragraph 7 of his memorandum. I prefer to look at this problem in a rather different way.

In the ordinary case of A. *v.* B. the way in which the trial is conducted, the witnesses who are called and so on, are matters entirely for the litigants and their advisers. In general the judge cannot control the witnesses to be called nor the order in which they are called; he certainly cannot compel a witness to be called. He hears the evidence as presented to him and the arguments of counsel and decides the case.

With a Tribunal of Inquiry all this is necessarily wholly changed, and this must be so for the Tribunal is by the terms of the Act directed to inquire into a definite matter of urgent public importance so that the Tribunal must give directions with regard to the inquiries to be made. You could not, in my opinion, as a practical and commonsense matter, appoint some other body (e.g. the Treasury Solicitor) to decide what inquiries should be made and for the Tribunal to act just as in the case of A. *v.* B. above. Of course, the Treasury Solicitor makes all the initial inquiries with police or other assistance, makes up the brief and on this he does not consult the Tribunal in practice who at an early stage are ignorant of the facts.

But as the inquiry proceeds, points arise which occur to members of the Tribunal collectively or individually upon which they direct the Treasury Solicitor to make further specific inquiries on some matter already before them and even into some entirely new matters. Apart from that, when you have no *lis* between the parties you must have consultation between the Tribunal and the solicitor presenting the facts as to the order in which matters should be investigated and witnesses called. This is always important for there is nearly always a number of independent streams of inquiry to be investigated.

8. In the Lynskey Tribunal we had regular meetings with the Treasury Solicitor during the inquiry. He took our instructions as to further inquiries and of course told us of the results of any investigations he had made either upon our instructions or independently, and of course arranged the order of business.

This seems to me a necessary corollary to the appointment of a Tribunal whose duties are essentially inquisitorial, with no *lis* defined by pleadings. We seem to have gone much further than the later cases mentioned by Mr. Donaldson in paragraph 6 of his memorandum, necessarily so in view of the diverse nature of our inquiry.

9. On these points my own view is

(1) There must obviously be an organisation to make the preliminary inquiries to interview the witnesses, to take proofs etc. no doubt after many police or other inquiries. This organisation should always be the Treasury Solicitor first because the inquiry must inevitably rest with the Crown, secondly because of the confidence he inspires, and thirdly because of the great expertise of his department in these matters.

(2) The Treasury Solicitor must necessarily consult and take the instructions of the Tribunal from the moment it is appointed and right through the inquiry until at least the evidence is concluded.

(3) Counsel instructed by the Treasury Solicitor should not see the Tribunal except in open court.

(4) Counsel instructed to conduct the inquiry should normally be the Attorney-General or the Solicitor-General because of their high standing both at the Bar and in the eyes of the public, but exceptional circumstances

might make it necessary for other counsel to appear. I see no harm in the "total involvement" mentioned by Mr. Donaldson in paragraphs 7 and 8 of his memorandum. It is the duty of the Tribunal alone to decide upon the evidence.

10. I feel no doubt that the hearings of the Tribunal of Inquiry under the 1921 Act should be in public unless security enters into it. An inquiry in private seldom allays public concern at the situation which has arisen. Lord Denning's Report, an inquiry which was not under the Act, was a brilliant exception.

11. Mr. Donaldson discusses pre-Tribunal inquiries. Of course these are obviously essential in every case, but I query their relevance to the question which the Royal Commission has to consider. In any event I have no experience upon which I can offer any constructive criticism.

12. I disagree with Mr. Donaldson in his observations in paragraph 17 of his memorandum which seems to misconstrue the real meaning of the word "urgent". The word is appropriate to matters other than mere speediness.

13. I would like to raise one matter which I believe has not yet been considered by the Royal Commission and it may be that it may be thought to be outside its terms of reference.

I was appointed in April, 1951 to inquire into a scheme called the Gambia Egg Scheme. I had the good fortune to have as my Secretary Mr. Humphreys, who is now the Secretary of your Commission. He confirms my recollection so far as relevant upon that inquiry. There are, of course, a large number of inquiries of this sort normally presided over by a member of the Bar (as I was when I was appointed), and sometimes it is convenient to hold them in private, as in that case, or in public. That has nothing whatever to do with the essentially public nature of a Tribunal under the 1921 Act. This particular inquiry has long been forgotten because it was a storm in a teacup, and my Report of May, 1952 was designed deliberately to take the heat out of the matter. But a question did arise, that is that I was somewhat concerned about the question of libel should I express my true views, and Mr. Humphreys supports my recollection that we gave this matter some serious consideration because I might have expressed myself in possibly a more forthright manner had I been free of the question of libel. No doubt the Government would have conducted my defence and paid any damages, but that is not the point. No member of the Bar, or other person appointed to hold an inquiry wants to be dragged through the courts and cross-examined about his Report and made to justify it, as in effect he is, of course, in cross-examination. It is generally assumed that Tribunals under the 1921 Act have absolute immunity though I think it might be wise to make this clear by giving the status to the Tribunal of a Superior Court of Record, at all events where the presiding officer is a judge. Perhaps it is a matter for the Royal Commission's consideration whether to recommend that a member of the higher judiciary must be chairman of a Tribunal. This would only recognise the existing practice.

14. I hope the Royal Commission will feel itself free to make recommendations giving some privilege to the authority of such lesser inquiries, such as the Gambia Egg Scheme, for a large number of such inquiries are held over the years.

MEMORANDUM OF EVIDENCE SUBMITTED BY DAME REBECCA WEST, D.B.E.

1. I am a novelist and critic who has from time to time engaged in the practice of journalism for the last fifty-five years. I attended both the Lynskey Tribunal in 1948 and the Vassall Tribunal in 1963. I am grateful for the opportunity kindly given me by the Royal Commission to inquire into the Tribunals of Inquiry to express some views which I formed as a result of these experiences.

2. For journalists, a most disconcerting situation arose during the Vassall Tribunal when certain members of their profession were asked to relinquish their privilege, which they share with doctors and priests, of not disclosing the source of information which they receive in the course of exercising their callings. I am fully aware that they enjoy this privilege by custom and not by

law. But usually it works to the advantage of all parties, and this is proved by the fact that it is the habit of the Government Departments to give out information about matters, which are in a state of flux or have occasioned controversy, on the condition that the official who gives them out is not named.

3. It is understood by all journalists, as it is by doctors and priests, that they should be required to break this seal of confidence only when the safety and well-being of the State is involved. Even so, my experience leads me to believe that to require such disclosures will always be hazardous. Either the journalist is honest or he is not. If he be dishonest, then he may name as an informant a person other than the one who gave him the information, and if he invented the information himself he will still name somebody. Not long ago I received a letter from a firm of solicitors who were representing a journal which was being sued for libel on account of an article written by a certain writer known to me. This writer had made a statement to the solicitors that he had written the article on the basis of certain information which he said he had received from me. The information consisted of a purely nonsensical story, which could not have been true, and which I had never heard before. I could not do anything except give a bare denial that I had given this information, because it is very hard to prove a negative. I would not have been able to do any more if this man had named me as an informant before a Tribunal, and I might have fallen under totally undeserved suspicion.

4. On the other hand, a journalist may truthfully name his informant, and that informant may untruthfully deny that he ever gave this journalist the information which is under discussion. This may be due to dishonesty. But we are dealing with a field where people find themselves suddenly involved in the open discussion of matters which have previously been private and are now the focus of public attention, often of a disturbing kind. In such circumstances people often say things which they afterwards regret, and in their unbalanced state very soon come to believe they never said them. If I may again draw on my experience ; some years ago the relative of a convicted person sent for me and asked me to get into print certain information about the convicted person. It was not in the interest of the convicted person or of the public that this information, which was inaccurate, should be published ; and I kept it to myself, but later communicated with her husband, who was duly grateful. Some weeks afterwards he spoke to her about it, and she denied ever having made this request to me, and I think her denial was honest. She had deluded herself when under an intolerable strain. Had this incident been investigated by a Tribunal of Inquiry, both she and I might have been regarded with undeserved suspicion.

5. For these reasons it seems to me that whenever there is any question of a Tribunal requiring a journalist to disclose the source of his information, the session should be secret. Yet it is obviously preferable that all sessions should be open. It is perhaps useful to remember that the Senate and House Committees of the American Government often hold secret sessions, and then, if anything is then firmly established, call open ones to repeat the gist of the proceedings.

6. It would also seem advisable that if a journalist is asked to break the seal of confidence by revealing his source, it should be clearly explained why he is asked to do this, and how the demand relates to the safety and well-being of the state. But this was not done in the Vassall Tribunal. Mr. Reginald Foster was committed for trial for contempt of court, because he refused to reveal the source of his information that Vassall bought female underclothing through the post from a certain store. Mr. Foster made this statement in some notes he turned in to his office, and it was never published. It was entirely true, Vassall himself giving evidence to that effect. The Tribunal asked Mr. Foster to give his source for it, on the ground that someone else had written an article for the same paper which employed him, that Vassall wore women's clothes on West End trips ; and it was thought that security organisations should have been aware of these trips. As a spectator in court I could not understand how giving the name of the person who told Mr. Foster that Vassall had bought women's underclothes from Woollands could throw light on whether Mr. Vassall went to the

West End wearing these clothes and whether the security organisations were negligent in not knowing that he did. Not only did I fail to understand this, no other spectator that I ever met could understand it, and I found that Mr. Foster did not understand it. The mystery became the greater when it appeared that there was no evidence whatsoever that Vassall had made these West End trips.

7. I have no doubt that the Tribunal had some reason for what it did, but it would have been better had it imparted it. For the result was not satisfactory. Many of the people in court thought that Mr. Foster was committed for trial for contempt of court for a purely frivolous reason. Others, who were not in court, were completely baffled by the incident and believed that Mr. Foster had been sent to prison because he had invented the whole story. I have even met one person who was convinced that Mr. Foster had invented the story and had been sent to prison for perjury. This is clearly very disagreeable.

8. Again, it is quite clear from the proceedings that Mr. Desmond Clough, of the *Daily Sketch,* another journalist who was committed for contempt of court, was asked for information regarding a paragraph he had published concerning the possibility that there had been a leak regarding N.A.T.O. naval exercises, without it being explained to him that there was an important reason why he should give that information. The reason does not appear as given in the questions asked before the Tribunal in the printed evidence. But it does appear in the Vassall Tribunal Report. As a layman, I feel surprised by the idea that a court might ask me to abandon what is considered in my profession an ethical imperative without fully explaining its reasons.

9. There is another point which struck me forcibly during the Vassall Tribunal. Theoretically there is no accused person in a Tribunal investigation ; but practically almost every witness who appears before a Tribunal is exposed to the same sort of public doubt as an accused person. It seems logical that the witnesses before a Tribunal should receive the same protection as an accused person in a criminal trial. But this is not the case. For example: in the criminal courts the prosecution discloses to the defence all its evidence. Surely there ought to be some sort of analogous disclosure during a Tribunal. But the practice seemed to be almost the contrary, a certain amount of concealment was practised which cannot have furthered the aims of the investigation. For example, Mr. Percy Hoskins of the *Daily Express* was cross-examined by Lord Carrington's counsel and by the Attorney-General, on a statement he had published to the effect that Houghton, one of the Portsmouth spy ring, had said that a Soviet agent had told him not to worry about collecting information about Polaris, as there was a spy already working at Holy Loch. But he could quote no authority except a recollection of having heard this at the trial of Houghton and Lonsdale and their associate two years before. The result of his cross-examination was that it looked to many people as if he had invented the story. This supposition was mentioned to me as a certainty by several people during the Tribunal and afterwards. Actually it turned out six days after the cross-examination of Mr. Hoskins on this point that Houghton had told this story in a statement to his solicitors, and that his statement had passed into the hands of the Treasury Solicitor, so that the Attorney-General had had the document at his disposal while he was engaged in this cross-examination.

10. There were other departures from the normal practice of the courts which seemed unfortunate: such as, for example, that the counsel for Mr. Galbraith denied that a certain reporter on the *Daily Mail,* whose interview with Mr. Galbraith had been printed, had in fact ever interviewed Mr. Galbraith at all. This denial was made on 15th January, and left Mr. Mulholland under the suspicion of having committed a flagrant imposture and a breach of professional practice which would probably have prevented his re-employment by any newspaper. On 18th January the counsel withdrew his denial, but it was passed over in a very perfunctory manner, and was indeed phrased in a manner which was actually misleading, though I am sure not by the wish of the counsel. Again I have met people aware of the accusation against Mr. Mulholland who never saw the correction.

11. It is to be noted that in the case of the Vassall Tribunal, and indeed of all Tribunals, it is extremely hard for the newspapers to give the public an accurate account of the proceedings, for technical reasons. A reporter covering these or any other legal proceedings sends into the office shorthand notes which are transcribed and set before a sub-editor, who has to cut the story down to fit his columns, by omitting what is irrelevant and leaving in what is important. The sub-editor has to perform this function against time, in order to get the various editions out into the streets and on to the trains. The efficiency with which he performs this task depends on his understanding of the general drift of the proceedings which are reported. Legal proceedings which are controlled by the indictments against the prisoner or the opening statement in a civil case give him some guide. But because of the roving nature of the investigations carried on by Tribunals, it is extremely difficult for a sub-editor to know what is important and what is not in the verbatim reports of their proceedings. This was particularly so in the Vassall Tribunal. In the Lynskey Tribunal, the witness was first examined by the Attorney-General, who first examined in chief and then cross-examined, and then he was cross-examined by the counsel of any other witness whose interests had been touched by his evidence, and finally he was examined by his own counsel. This procedure was not followed by the Vassall Tribunal. There the witness was first examined by his own counsel who had no idea what the Tribunal had been discussing during the secret sessions and seemed often not to know what interest the Tribunal had in his client, and the Attorney-General, who alone knew along what lines the Tribunal was deliberating was often the last to cross-examine the witness. The result was that a flood of material went into the newspaper offices which often baffled the sub-editors, and indeed, I think, the editors. Hence, many members of the public were in a state of grave delusion about the proceedings, often to the disadvantage not only of my fellow-journalists, but of other quite blameless people involved in the case.

12. For this reason it is surely advisable that the report of a Tribunal should be published together with the evidence. Not only would this give the public information which there is really no other way of imparting to it, but it would mitigate the great drawback of the Tribunal that in looking for the guilty it often leaves a slur on the innocent. This would have powerfully affected at least one witness. It would surely be advisable also that such portions of the secret sessions as do not threaten security should be published, in order to give a less incoherent picture. It appears from reference to the secret sessions in the Vassall Report that some of them touched matters quite irrelevant to security.

13. There is another difficulty about the Tribunal system which I mention with hesitation. It is obviously almost unthinkable that it should be laid down that participation in a Tribunal should deprive a participant of the power to exercise his legal right to bring an action for libel regarding matters investigated by the Tribunal in the civil courts. But it is the oddest of situations that a libel action should be taken into court and tried by a jury already familiar with the facts alluded to in the action, in the form that these have already been ascertained in another court, the Tribunal, where the procedure is in many respects far looser, even to the point of listening to hearsay evidence. This is surely objectionable in principle ; and as for practice, it was certainly derogatory to the dignity of the Vassall Tribunal that it was shadowed throughout by the suspicion that the counsel representing Mr. Galbraith and Lord Carrington and certain newspapers were moved in what they said by considerations of what might happen in future actions before other courts. I raise this point with reluctance, but it seems to me that in the future grave dangers might arise. It might be that in a time of crisis a person connected with some political party might persuade Parliament to set up a Tribunal to investigate some affair in which he had played a part, though there would not be absent from his mind some intention of establishing a case under Tribunal practice against his opponents which he would not be able to establish under the stricter rules of the civil courts, and then bringing an action in the civil courts which would enable him, in the atmosphere which had been created, to destroy his opponents' prestige and mulct them of damages. I hasten to say that I wish to make no suggestion that either Lord Carrington and Mr. Galbraith were not justified in bringing the actions which they did.

MEMORANDUM OF EVIDENCE SUBMITTED BY THE STAFF SIDE OF THE CIVIL SERVICE NATIONAL WHITLEY COUNCIL

The Staff Side of the Civil Service National Whitley Council represents the whole of the non-industrial Civil Service totalling about 815,000 staff.

2. In this memorandum the Staff Side are concerned with the position of the Standing Commission on Security.

3. Lord Denning's Report on the Profumo inquiry was the subject of a Parliamentary debate on 16th December, 1963. The Prime Minister, Sir Alec Douglas-Home, opened the debate and in the course of his speech referred to the possibility of there being set up a standing security commission with a judicial chairman.

4. On 23rd January, 1964, the Prime Minister announced the setting up of a "Standing Security Commission" with the following terms of reference:—

> "If so requested by the Prime Minister, to investigate and report upon the circumstances in which a breach of security is known to have occurred in the public service and upon any related failure of departmental security arrangements or neglect of duty; and, in the light of any such investigations, to advise whether any change in security arrangements is necessary or desirable."

5. The members of the Security Commission appointed by the Prime Minister were, and still are:—

The Right Honourable Lord Justice Winn, C.B., O.B.E. (*Chairman*).

The Right Honourable the Lord Normanbrook, G.C.B.

Admiral of the Fleet Sir Caspar John, G.C.B.

Lord Caccia, G.C.M.G.

The Right Honourable Sir Jocelyn Simon, P.C.,

Lord Sinclair of Cleeve, K.C.B., K.B.E.,

General Sir Dudley Ward, G.C.B., K.B.E.

6. The Committee has been brought into action once since it was set up. This arose following the conviction on 10th May, 1965, of Mr. F. C. Bossard of the Ministry of Aviation and Staff Sergeant Allen of the Ministry of Defence for offences under Section 1 of the Official Secrets Act. The Commission was asked by the Prime Minister to investigate the circumstances in which those breaches of security had occurred in the public service and to advise in the light of their investigations whether any change in security arrangements was necessary or desirable.

7. The Commission reported to the Prime Minister (Mr. Harold Wilson) in June, 1965. The Prime Minister presented the report to Parliament in July, 1965 (Cmnd. 2722).

8. The Staff Side were seriously perturbed about the procedure which the Commission followed when examining Civil Service witnesses. The civil servants were summoned to appear before the Commission. They had no knowledge that they were to be named in the Report. They were not allowed to be represented. They had no opportunity of defending themselves against the charges levelled against them. They were not allowed access to the papers about which they were being questioned. They were not allowed to refer to their own notes which formed part of the official files.

9. The position was sufficiently disturbing for the Prime Minister to say:—

> "When one has an inquiry of this kind and individuals are named and the names are published in the report, it raises some very difficult questions which might affect the efficiency of the service and the willingness of people to embark on security work if they are to be pilloried in this way."

10. The Prime Minister also announced, in the following terms, the setting up of a Board of Inquiry:—

> "In the case of the civil servants concerned, I have decided to appoint a Board of Inquiry to examine the facts and to assess the nature and gravity of any neglect of duty which may have occurred in order to assist in deciding whether disciplinary action is required. The individual civil servants who will appear before the board may be appropriately represented if they so wish. The members of this board will not be serving civil servants."

11. The Staff Side then wrote to Sir Laurence Helsby, Head of the Home Civil Service and Chairman of the Civil Service National Whitley Council, in the following terms:—

27th July, 1965.

Dear Sir Laurence,

The Report of the Standing Security Commission June, 1965 and the exchanges in the House of Commons when the Prime Minister submitted the Report to Parliament on 22nd July, have been considered by the Staff Side. A number of issues will obviously need to be discussed on the Whitley Council and the Staff Side will welcome a joint meeting as soon as is convenient to the Official Side. But there is a duty on the Staff Side to make clear at once their attitude on the way this question has been handled.

As the Staff Side understand the position the procedure used on this occasion was to invite the civil servants concerned with the security aspects of Bossard's employment to appear before the Standing Commission and to seek their co-operation in finding the truth. The Civil Servants were not told that they were to be publicly censured until a day or two before publication of the Report. They had no opportunity of correcting any misunderstanding which may have arisen from their questioning by the Commission. They were, in effect, asked to be helpful and then castigated without being afforded a further appearance before the Commission.

There is certainly a strong feeling that the statements made by the Commission could be challenged at law if it were not for the fact that they are made under Parliamentary privilege.

There is now to be a Board of Inquiry to examine the facts and to assess the nature and gravity of any neglect of duty which may have occurred in order to assist in deciding whether disciplinary action is required against the named civil servants.

The Report, which will be before the Board of Inquiry, expresses the following views on one of the people whose case will be under consideration:—

> "a seriously mistaken attitude of mind"
>
> "should have been fully aware"
>
> "should have given sufficient weight . . . to cause an immediate investigation"
>
> "we remark advisedly upon the fact that, despite presumption of unfitness, no action was taken to bring Bossard forward for early field enquiries".

Of another it says:—

> "was guilty of an error of judgment and a failure properly to assess his responsibility".

The Board will be holding its inquiry against the background of judgments on individuals to which widespread publicity has been given ; no one believing in justice and fair play can accept this as satisfactory. The Staff Side believe that an elementary requirement of justice is that there should be full rights of appeal and examination by an appropriate body *before* public censure.

Both the Leader of Her Majesty's Opposition and the Prime Minister had something to say about the handling of these cases. Sir Alec Douglas-Home drew attention to the fact that the events took place some time ago in a situation very different from that of the present day. He endorsed the setting up of the Board of Inquiry and stressed the importance of there being no injustice done to the people concerned.

The Prime Minister acknowledged that the naming of individuals raised some very difficult questions which might affect the efficiency or the Service and the willingness of people to embark on security work if they are to be pilloried in this way.

The Staff Side warmly welcome these statements as a clear indication that Parliament is not at all happy about the procedure which has been followed and they hope that a much more satisfactory method can be evolved.

As far as the Board of Inquiry is concerned, the Staff Side would be glad to have information about its composition and the way in which it will function. The Staff Side would like an assurance that the Board of Inquiry will not interfere with, or supersede, the agreed principles of Civil Service disciplinary procedure.

Yours sincerely,
RICHARD HAYWARD,
(*Vice-Chairman*).

12. Sir Laurence replied:—

Dear Mr. Hayward,

You wrote to me on 27th July about the report of the Security Commission.

Your letter makes some general comments on the procedure followed by the Commission. You will not expect me to say more at this stage than that we have taken due note of these comments. You will have seen that the Prime Minister said in his statement in the House on 22nd July that "it may be that some other procedure would serve better in future and this is a matter which must be considered in due course", and I would also draw your attention to his written answer to a Question by Mr. Marten yesterday (Hansard cols. 260–262: attached).

You ask that there should be a discussion, as soon as convenient, about a number of issues arising from the Commission's report. I can certainly promise you such a meeting, but it is bound to take a little time to assess the implications of some of the Commission's suggestions. I shall let you know as soon as we are ready.

I can readily give you the assurance you seek at the end of your letter about the Board of Inquiry announced by the Prime Minister. The function of the Board will be to examine the facts and to assess the nature and gravity of any neglect of duty which may have occurred in order to assist in deciding whether disciplinary action is required. As the Prime Minister explained on 22nd July, individual civil servants who appear before the Board may be appropriately represented if they so wish. The decision whether disciplinary action is required, following the Board's report, will remain with the responsible Minister. At that stage, the agreed disciplinary procedure will be followed.

Yours sincerely,
LAURENCE HELSBY.

13. The Hansard reference in Sir Laurence's letter was to the following:—

"Mr. Marten asked the Prime Minister if all those who assisted or were interviewed or gave evidence to the Standing Security Commission which investigated the Bossard and Allen cases were warned that their evidence might be published or used as the basis of disciplinary action; and if he will make a statement.

The Prime Minister: Evidence given to the Commission will not, in fact, be the basis of any disciplinary action, and I understand that in these circumstances the Commission felt it unnecessary to give any warning to witnesses. I explained in my statement of 22nd July that separate inquiries would be made into the actions of individuals, and that the Royal Commission on Tribunals would have authority to inquire into the proceedings appropriate for types of investigation of security and allied subjects."

14. The Board of Inquiry set up by the Prime Minister consisted of:—

Sir Henry Wilson-Smith, K.C.B., K.B.E.
Sir Harold Kent, G.C.B.
Sir Norman Kipping, K.B.E.

15. The Board "were asked to examine the facts and to assess the nature and gravity of any neglect of duty which may have occurred on the part of the Civil Servants to whom the Commission refer in their Report so as to assist in deciding whether any disciplinary action was required." (Cmnd. 2773, paragraph 1). It reported to the Prime Minister on 6th September, 1965 (Cmnd. 2773).

16. The Board examined the cases of four civil servants, two of whom had been named in the Security Commission's Report. Both were represented when they appeared before the Board of Inquiry; one by the General Secretary of the Staff Association to which he belonged before retirement and the other by a barrister.

17. The Report of the Board of Inquiry (Cmnd. 2773) completely exonerated one of the named Civil Servants. As far as the other named Civil Servant was concerned the Board did not endorse the three criticisms made by the Security Commission but on their own account made a criticism that the individual had not familiarized himself with the security instructions as he should have done and that his attitude to security work was at fault.

18. The Report was not considered by the authorities to justify disciplinary action against any of the four civil servants interviewed, including those who had been named in the Report of the Security Commission.

19. The Staff Side recognise that the Security Commission were operating thout any agreed procedural guidance and were under pressure to produce early report. They believe, however, that the history of this case demonstrates ıe need for the laying down of procedures and for the civil servants who may ɔe included to have certain safeguards.

20. The Staff Side, therefore, suggest for the consideration of the Royal Commission that procedures should be adopted and made known to all who may be concerned and that such procedures should include for the individual civil servant:—

(*a*) the right to be informed of the purpose of his interrogation;
(*b*) the opportunity to consult the relevant papers as available to him at the time of the incident;
(*c*) access to any file notes which he made;
(*d*) adequate time for the preparation of material before appearing before the Commission;
(*e*) the opportunity to be represented, within the limits imposed by State Security, if he so wishes;
(*f*) the opportunity to comment, before presentation of the Report, on the Security Commission's references to his handling of the case;
(*g*) the opportunity to clear himself, before presentation of the Report, of any charges which the Security Commission level against him.

21. The Staff Side believe that a procedure of this kind would not only safeguard the rights of the individual but would ensure a much more satisfactory examination of any future case than occurred in the only one dealt with up to now.

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